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THE ONTARIO LAW REPORTS.

CASES DETERMINED IN THE COURT OF APPEAL
AND IN THE HIGH COURT OF JUSTICE
FOR ONTARIO.

1901.

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VOL. II.

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JUDGES
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On September 24th, 1901, BYRON MOFFATT BRITTON, one of His Majesty's Counsel, was appointed one of the Justices of the King's Bench Division.

On October 11th, 1901, the Honourable SIR JOHN ALEXANDER BOYD, Chancellor of Ontario, Knight Bachelor by Patent, was admitted to the dignity of Knight Commander of the most distinguished order of St. Michael and St. George, by His Royal Highness the Duke of Cornwall and York, under Royal Warrant, at Government House, Toronto.

On February 9th, 1902, the Honourable JAMES FREDERICK LISTER, one of the Justices of Appeal, died at his residence, Toronto.

ERRATA.

Page 169, line 10 from bottom—For “ 1889 ” read “ 1888.”

Page 170, line 7 from bottom—For “ propose ” read “ purport.”

Page 301, head note, line 3—For “ award ” read “ amount.”

Page 726, line 11 from top—For “ with ” read “ without.”

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REPORTS OF CASES

DETERMINED IN THE

COURT OF APPEAL

AND IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[IN CHAMBERS.]

SINCLAIR ET AL. V. CAMPBELL ET AL.

1901

Security for Costs—Both Parties Out of Jurisdiction—Rival Claimants of Fund.

May 15.
May 29

Where both plaintiffs and defendants were resident out of Ontario and both claimed a fund of \$500 bequeathed by a will, they were required to give security, each to the other, for the costs of an issue directed to be tried.

In re La Compagnie Générale d'Eaux Minérales, [1891] 3 Ch. 451, followed.

In re Société Anonyme des Verreries de l'Etoile (1893), 10 Pat. Cas. 290, and

In re Miller's Patent (1894), 11 Pat. Cas. 55, distinguished.

MOTION by the defendants for an order requiring the plaintiffs to give security for costs of an issue directed to be tried; and cross-motion by the plaintiffs for a similar order against the defendants. The facts are stated in the judgments.

The motion was heard by Mr. Winchester, the Master in Chambers, on the 11th May, 1901.

F. E. Hodgins, for the defendants.

J. T. Small, for the plaintiffs.

May 15. THE MASTER IN CHAMBERS:—This is an issue directed to be tried by an order of the late Mr. Justice Rose to ascertain the parties entitled to a fund of \$500 left by the late John Walker, whose estate is being administered by the direction of this Court. Pursuant to the advertisement of the Master, both plaintiffs and defendants have claimed the fund, and an issue has been directed to ascertain the parties entitled

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under the particular wording of the testator's will. Both parties have moved for security for costs against each other. The defendants contend that they are not liable for security, as they have made a *prima facie* case of right to the fund. To decide this, however, is not within the province of the Master in Chambers. What he has to decide is, which is really the actor: see *Knickerbocker Trust Co. of New York v. Webster* (1896), 17 P.R. 189. In this case both parties are actors; both are outside the jurisdiction; and, as held by Mr. Justice Stirling, in *In re La Compagnie Générale d'Eaux Minerales*, [1891] 3 Ch. 451, the security should be mutual: see at p. 458.

The order for security will go accordingly; the amount to be spoken to.

The defendants appealed from the order in so far as it required them to furnish security for costs, and their appeal was heard by BOYD, C., in Chambers, on the 27th May, 1901.

Hodgins, for the appellants, relied on *In re Société Anonyme des Verreries de L'Etoile* (1893), 10 Pat. Cas. 290; *In re Miller's Patent* (1894), 11 Pat. Cas. 55.

Small, for the plaintiffs, in addition to the cases in the Master's opinion, referred to *Belmonte v. Aynard* (1879), 4 C.P.D. 352; *Tomlinson v. Land and Finance Corporation* (1884), 14 Q.B.D. 539; *Rhodes v. Dawson* (1886), 16 Q.B.D. 548; *Canadian Bank of Commerce v. Middleton* (1887), 12 P.R. 121; *Swain v. Stoddart* (1887), *ib.* 490; *Re Ancient Order of Foresters and Castner* (1890), 14 P.R. 47; *Re Parker* (1895), 16 P.R. 392; *In re Milward*, [1900] 1 Ch. 405.

May 29. BOYD, C.:—The Master's order should be affirmed. Both claimants of the fund reside out of the jurisdiction, and each comes in to assert his claims against the other. Neither is brought into Court to protect his rights attacked within the jurisdiction. So that the cases cited for the appellants are not applicable. Security was not ordered in the one case because it was sought to revoke the foreigner's patent, and in the other it was refused because it was sought to expunge his trade-mark. But here the case *In re La Compagnie Générale d'Eaux Minerales*, [1891] 3 Ch. 451, is quite in point, because both the parties are actively asserting their title to the fund and both reside out of

the jurisdiction. Mr. Justice Stirling ordered that if there was to be security for costs, both should give it. He again affirms the same practice in the later case in 10 Pat. Cas. at p. 292, and justifies it as a matter of mutuality.

Dismiss the appeal with costs payable forthwith.

I make this order as to costs in hopes that the appellants will accede to the offer of the respondents that the fund in question, which is only \$500, should be divided equally between them. It is given for the *benefit of the poor* in connection with the "Free Church in Tarbert, Argyleshire, Scotland, Britain," to be under control of the pastor and session of the congregation—but, if there is a secession in the congregation, it is to be under the control and management of that party which adheres to and practises the doctrine and mode of worship that were held in the Free Church of Scotland in A.D. 1849. The diverse claims are between an alleged secession and the "old-timers," and it is manifest that the conduct of an ecclesiastical and theological campaign in Ontario respecting the status of this church in Tarbert will involve more outlay than the amount of the bequest. If the parties agree to divide so that the poor may get the testator's bounty—no costs of this appeal, and division may be on terms suggested by the late Mr. Justice Rose.

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[IN THE COURT OF APPEAL.]

C. A. TOWNSHIP OF ELIZABETHTOWN V. TOWNSHIP OF AUGUSTA.

1901

May 14.

Drainage—Artificial Obstruction — Failure of Scheme — New Report without Examination.

A dam in a stream in the defendant township had the effect of penning back the water in and of preventing logs and other obstructions from making their way down the portion of the stream in the plaintiff township. The plaintiff township initiated a scheme under the drainage clauses of the Consolidated Municipal Act, 1883, for the removal of the dam and other obstructions, and an engineer made the necessary examination and report in due form, but this scheme was set aside as unauthorized by the Act. After the amendment in 1886 of the drainage clauses by the addition of sub-secs. 18, 19 and 20 to sec. 570 the plaintiff township again initiated the scheme and referred it to the same engineer, who, without any further examination, rewrote his report and adopted his previous estimates and assessments. Notice was served in due course upon the defendant township and there was no appeal, and the plaintiff township did the work and brought this action for payment of the proportion of the cost assessed against the defendant township :—

Held, that the scheme was authorized by the amending sections, but, *per* OSLER, and LISTER, JJ.A., that the report of the engineer was invalid and the scheme not binding. ARMOUR, C.J.O., and MOSS, J.A., taking the contrary view.

In the result the judgment of Street, J., in favour of the defendants, was affirmed.

AN appeal by the plaintiffs from the judgment at the trial, was argued before ARMOUR, C.J.O., OSLER, MOSS, and LISTER, JJ.A., on the 29th of January, 1901. The facts are stated in the judgments, and the line of argument is there indicated.

Watson, K.C., and *H. C. Osborne*, for the appellants.

J. A. Hutcheson, for the respondents.

May 14. ARMOUR, C.J.O.:—Mud Creek flows from Mud Lake, in the township of Elizabethtown, in an easterly direction through lots 28 to 14 inclusive, and through part of lot 13 in the 8th concession of the said township, and thence through part of lot 13 and through lots 12 to lot A. inclusive in the 9th concession of the said township, and thence across the town line between the townships of Elizabethtown and Augusta, thence through lot 37 in the 9th concession of Augusta and across the concession line between the 8th and 9th concessions, and thence through part of lot 37 and through lot 36 in the 8th concession of the said last mentioned township, on which last mentioned lot was a mill-dam owned by one Bellamy, which penned back

the waters of the said creek and caused them to overflow a large quantity of land in the said townships.

Negotiations were had with the said Bellamy for the removal of the said dam, who agreed to do so for the sum of \$5000.

In 1884 a petition having been presented to the council of Elizabethtown for the removal of obstructions, the principal of which was the said dam, which prevented the free flow of the waters of the said creek, the council acting in accordance, as they thought, with the law as it then was, The Consolidated Municipal Act, 1883, sec. 570, procured one Willis Chipman, an engineer, to make an examination of the creek from which it was proposed to remove obstructions, and procured plans and estimates to be made of the work by such engineer, and an assessment to be made by him of the real property to be benefited by such work, stating as nearly as might be in his opinion the proportion of benefit to be derived therefrom by every road and lot or portion of lot. Thereafter, in April, 1885, the said engineer made his report to the council of Elizabethtown with the said plans and estimates and the assessment made by him, and the council of Elizabethtown thereupon passed a by-law for the aforesaid purpose, and having served the council of the township of Augusta with a copy of the report, plans, specifications, assessment, and estimates of the said engineer, the last mentioned council appealed, and the arbitrators appointed determined that the law did not apply to the removal of an artificial obstruction such as the dam above mentioned, and so the proceedings became abortive.

And in order to remedy this difficulty, The Municipal Amendment Act, 1886, sec. 22, was passed amending sec. 570 of The Consolidated Municipal Act, 1883, by adding thereto sub-secs. 18, 19 and 20 therein set forth.

Thereafter, on the 6th September, 1886, a petition was presented to the council of Elizabethtown purporting to be of a majority of the persons shewn by the last revised assessment roll to be the owners of the property to be benefited by the work therein mentioned, setting forth that a stream, known as Mud Creek, running through the township of Elizabethtown and from thence to the township of Augusta in the county of

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Grenville, was obstructed by a certain dam belonging to one John B. Bellamy, erected on lot number 36 in the 8th concession of the said township of Augusta, then known as Bellamy's mill-dam, and by other obstructions, which said dam and obstructions prevented the free flow of the waters of the said creek. That the said John B. Bellamy had agreed, in consideration of the sum of five thousand dollars, to take down and remove said dam. That the taking down and removal of said dam and of the other obstructions in said creek from said dam to the east side line of lot number 30 in the 8th concession of the said township of Elizabethtown would benefit a large tract of land, to wit, lots numbers 5 to 29 inclusive in the 8th concession of the said township of Elizabethtown and lots numbers 1 to 16 inclusive in the 9th concession of the said township of Elizabethtown, and lots 37 to 33 inclusive in the 8th and 9th concessions of the said township of Augusta. And the petitioners prayed that said mill-dam and other obstructions in said creek might be removed (said mill-dam being removed by carrying out and completing said proposed arrangement with said John B. Bellamy) from the said dam of the said John B. Bellamy up to the east side line of lot number 30 in the 8th concession of said township of Elizabethtown. And that for that purpose all proper steps might be taken in pursuance of the Municipal Act and the sections thereof relating to drainage and all proper by-laws passed and surveys made.

It was admitted that the last revised assessment roll of the township of Elizabethtown at the time of the presentation of this petition was that of the year 1886, and that this petition was signed by a majority in number of the persons shewn by that roll to be the owners whether resident or non-resident of the property to be benefited in the township of Elizabethtown.

The owners to be benefited in the township of Augusta were not taken into account.

The council of Elizabethtown thereupon instructed the said Chipman to make an examination of the creek from which it was proposed to remove the said obstructions, and procured plans and estimates to be made of the work by him and an assessment to be made by him of the real property to be benefited by such work, stating as nearly as might be in his opinion

the proportion of benefit to be derived therefrom by every road and lot or portion of lot.

Chipman did not proceed under these instructions to make another examination of the creek and fresh plans and estimates and a new assessment, but on the 19th May, 1887, made a new report, accompanying it with the plans, estimates, and assessment he had previously made, and dating them as he dated the report. This report shewed \$4,986 to be assessable against lands and roads in Elizabethtown, and \$764 against lands and roads in Augusta.

The council of Elizabethtown thereupon passed the prescribed by-law in due form, and on the 20th July, 1887, the council of the township of Elizabethtown served the head of the council of the township of Augusta with a copy of the report, plans, specifications, assessment, and estimates of the said engineer, which were not appealed from.

The council of the township of Augusta never passed any by-law, as required by sec. 581 of the said Act, for raising the sum named in the report as assessable against the real property in that township benefited by the said work, nor did they pay over the same or any part thereof to the township of Elizabethtown. And the council of the township of Elizabethtown having paid the whole cost of the work, seeks in this action to recover against the defendants the sum named in the report as assessable against the lands and roads in the township of Augusta.

The action was tried before Street, J., at Brockville on the 14th June, 1900, who dismissed the action with costs.

The plaintiffs appealed.

The first objection raised to the plaintiffs' recovery was that there was no jurisdiction in the council of the township of Elizabethtown to take the proceedings and pass the by-law they did, for the petition was signed only by a majority in number of the persons as shewn by the last revised assessment roll of that township to be the owners, whether resident or non-resident, of the property to be benefited in that township, and was not signed by a majority in number of the persons as shewn by the last revised assessment roll of the township of Augusta to be the owners, whether resident or non-resident, of

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the property to be benefited in the latter township, and the principal obstruction for the removal of which the petition was presented being the dam which was situate in the adjoining township of Augusta, wholly beyond the limits of the township of Elizabethtown.

The question here raised is a new one by reason of the special provisions respecting obstructions contained in sec. 569 of R.S.O. 1887, ch. 184, which I refer to as containing the law which governed the proceedings here in controversy, and none of the cases hitherto decided can be invoked as conclusively determining it.

Sec. 569 provides for the petition to the council "for the removal of any obstruction which prevents the free flow of the waters of any stream, creek or watercourse."

Sub-sec. 18 provides that "where any obstruction within the meaning of the provisions of this section is wholly situate or existing beyond the limits of the municipality, the same shall for all purposes and with respect to every provision of this Act be deemed and taken to be an obstruction situate and existing partly within and partly without the limits of the municipality, and as if the proposed work or operations in connection therewith or with the removal thereof were to be done and performed in part within the limits of the municipality and in part to be continued and extended beyond such limits, and all the provisions of this Act shall be held and deemed to apply and operate accordingly."

Sub-sec. 19 provides that "where such obstruction is occasioned by or is a dam or other artificial structure, the council shall be deemed to have full power to acquire, with the consent of the owner thereof and upon payment of such purchase money as may be mutually agreed upon, the right and title to remove the same wholly or in part, and any amount so paid or payable as purchase money shall be deemed part of the cost of the works under this section in connection with the removal of such obstruction, and shall be dealt with and provided for accordingly."

Sub-sec. 20 provides that "the two preceding sub-sections are to be taken as applying only to cases where the obstruction

is actually situate or existing in a municipality next adjoining to the municipality mentioned in such sub-sections."

The evidence shewed that the dam was really the only obstruction in the creek, for it was shewn that if the dam were removed, all the other obstructions would pass down the creek with the free flow of the water.

This dam was therefore an obstruction within the meaning of the provisions of sec. 569, wholly situate beyond the limits of the township of Elizabethtown, and for all purposes and with respect to every provision of the Act was to be deemed and taken to be an obstruction situate and existing partly within and partly without the limits of the township of Elizabethtown, and as if the proposed work or operations in connection therewith or with the removal thereof were to be done and performed in part within the limits of that municipality and in part to be continued beyond such limits.

And the object of sub-sec. 18 was, as applied to this case, to provide that, inasmuch as the township of Elizabethtown had power to remove any obstruction which prevented the free flow of the waters of the creek within its limits, and to continue such work beyond its limits and into the adjoining township of Augusta, under the provisions of sec. 575, this dam, though wholly in the township of Augusta, should be deemed and taken to be an obstruction situate and existing partly within and partly without the limits of the township of Elizabethtown, and as if the removal thereof was to be performed in part within the limits of the township of Elizabethtown and in part to be continued and extended beyond such limits and into the adjoining township of Augusta, as provided by sec. 575.

If, however, those are to be taken to be obstructions in the creek which would, the dam being removed, pass down the creek with the free flow of the water, and were within the limits of the township of Elizabethtown, that township had authority to remove such obstructions and to continue such removal into the township of Augusta under sec. 575, the township of Elizabethtown having the power to acquire the said dam under sub-sec. 19.

I am of the opinion, therefore, that what the township of Elizabethtown did it had the power to do upon the petition

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presented to its council, and that such petition was sufficiently signed for the purpose, and that it was not necessary that it should be signed by any of the owners of property to be benefited in the township of Augusta.

The next objection taken was that the engineer did not, after the petition was presented in September, 1886, make a new examination of the lands, merely changing the date on his plan and drawing a new report containing the same assessment as his former report did.

The engineer had already examined the lands, and assessed those lands that would be benefited by the proposed work, and it was not suggested that any change had taken place from the time he had examined and assessed them up to the time that he made his new report, and it is difficult to imagine how there could have been any change; but a copy of his report, plans, specifications, assessment and estimates was served upon the head of the council of the township of Augusta, and not having been appealed from, became binding on such council under sec. 579.

It was next objected that the sum mentioned in the report as assessed against lands and roads in the township of Augusta could not be recovered, that if there was any remedy it was only by mandamus, and that the Court would not grant this writ after such a lapse of time.

The only parts of the statute bearing upon this objection are contained in sub-sec. 2 of sec. 569, which provides for the "borrowing on the credit of the municipality the funds necessary for the work, although the same extends beyond the limits of the municipality (subject in that case to be reimbursed as hereinafter mentioned)." And in sec. 580, to which the words "subject in that case to be reimbursed as hereinafter mentioned" refer, which provides that "the council of such last mentioned municipality shall within four months from the delivery to the head of the corporation of the report of the engineer or surveyor, as provided in the next preceding section, pass a by-law or by-laws to raise such sum as may be named in the report, or, in case of an appeal, for such sum as may be determined by the arbitrators, in the same manner and with such other provisions as would have been proper if a majority of the owners of the

lands to be taxed had petitioned as provided in sec. 569 of this Act."

These provisions created, in my opinion, a statutory obligation on the part of the defendants to raise and pay over to the plaintiffs the sum named in the report.

In *Anonymous* (1704), 6 Mod. 27, Holt, C.J., said: "Wherever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity." See also *Hopkins v. Mayor of Swansea* (1839), 4 M. & W. 621; *S.C.* (1841), 8 M. & W. 901; *Goody v. Penny* (1842), 9 M. & W. 687; *Weale v. West Middlesex Waterworks Co.* (1820), 1 Jac. & W. 358.

In *Shepherd v. Hills* (1855), 11 Exch. 55, the action was for rates and duties imposed by 32 Geo. III., ch. 74, and Parke, B., said: "There is no doubt that wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary."

The only other objection taken was that the plaintiffs' claim was barred by the Statute of Limitations. But being a statutory obligation, it required twenty years to bar it: *Cork and Bandon Railway v. Goode* (1853), 13 C.B. 827; *Shepherd v. Hills*, 11 Exch. 55.

The appeal should therefore be allowed with costs, and judgment should be entered for the plaintiffs for the sum of \$764 with interest from the 20th day of November, 1888, and full costs of suit.

OSLER, J.A.:—I think, for the reasons given by my brother Lister, whose judgment I have had an opportunity of reading, that the appeal should be dismissed.

MOSS, J.A.:—I understand my brother Lister to be of the opinion that the plaintiffs would be entitled to judgment in this action but for the objection that the engineer, Mr. Willis Chipman, did not make an examination of Mud Creek and the real property to be affected by the work provided for by by-law

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No. 308, after the receipt of the last petition therefor, but instead made his plans, estimates, assessment and report upon knowledge derived from a previous examination made for the purpose of preparing plans and estimates and making an assessment and report.

This objection was not raised in the statement of defence, and was first urged in answer to the appeal in this Court, and we have not the benefit of the opinion of the learned trial Judge upon the point.

The engineer had been appointed and instructed by the council of Elizabethtown on a former occasion to make an examination and prepare plans and make an assessment for a precisely similar scheme. He had then made an actual examination, prepared plans, and made an assessment, and reported them to the council.

The scheme was set aside on the ground that it was not authorized by the drainage provisions of the Municipal Act as they then existed. In consequence of this, further legislation was had to enable the scheme to be carried out, and the petition for the scheme now in question was presented, and acted upon by the council again appointing the same engineer. He possessed all the information and knowledge requisite to enable him to prepare plans and estimates and make an assessment, and instead of going over again the area, which had not in the meantime changed in condition, he adopted his former plans, estimates, and assessments, and made his report to the council. That body acted upon the report without, so far as is shewn, being aware that the engineer had not actually gone over the ground again with a view to its preparation.

Sec. 570 of the Municipal Act of 1883, under which the proceedings were taken, provides "that the council may procure an engineer or provincial land surveyor to make an examination of the stream, creek, etc., . . . and may procure plans and estimates to be made of the work by such engineer or surveyor, and an assessment to be made by such engineer or surveyor of the real property to be benefited by such work."

The council did procure an engineer for these purposes by appointing Mr. Chipman, a competent engineer, to perform these duties. And the statement in his report that he had made an examination and an instrumental survey of the creek was in

accordance with the facts. I think that, under the circumstances, there was an actual assessment made by the engineer. I do not understand that in order to make the assessment valid the engineer must be actually on the ground when he puts down the figures. The object of an examination is to obtain the information necessary to enable him to arrive at the proper figures. Having gained that information, he proceeds to make his computations and apportion the amount according to the proportion of benefit to be derived therefrom, and the assessment thus made is embodied in his report. In this instance, the engineer having obtained the information in the course of the previous employment, and the knowledge so gained being precisely what was needed for this occasion, made his assessment upon that knowledge.

The assessment so made was not an illusory or mere formal proceeding. It was an actual exercise of judgment founded upon information and knowledge. And the fact that the engineer was able to do that without making another visit to the creek or a formal traverse of the area, should not at all detract from its effect. I think it should be regarded as an assessment in fact which bound the properties affected, unless set aside or varied on appeal, in accordance with the provisions of the statute. Every subsequent proceeding was duly taken by the plaintiffs as required by the statute. The head of the defendants' council was duly and properly served with copies, and no appeal was taken. The work was proceeded with, and the lands in the defendant municipality which were assessed have received the benefit thereof. I do not think it should now be deemed open to the defendants to question the propriety of the engineer's work. There having been no appeal, the proceedings ought to be held binding upon the defendants, as enacted by sec. 580 of the Municipal Act of 1883, and should be upheld as against them in this action.

LISTER, J.A.:—I think the plaintiffs' right to recover in this action depends upon whether there was an assessment within the meaning of "The Consolidated Municipal Act, 1883," the Act in force at the time the proceedings in question were had.

The portions of the 570th section of this Act material to this enquiry read as follows: "In case the majority in number

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of the persons as shewn by the last revised assessment roll to be the owners . . . of the property to be benefited in any part of any township . . . petition the council for . . . the removal of any obstruction which prevents the free flow of the waters of any stream, creek or watercourse . . . the council may procure an engineer or surveyor to make an examination of the stream, creek or watercourse . . . from which it is proposed to remove obstructions . . . and may procure plans and estimates of the work by such engineer or surveyor, and an assessment to be made by such engineer or surveyor of the real property to be benefited by such work . . . and if the council is of opinion that the proposed work or a portion thereof would be desirable, the council may pass by-laws (1) for providing for the proposed work or a portion thereof being done, as the case may be; (2) for borrowing on the credit of the municipality the funds necessary for the work, although the same extends beyond the limits of the municipality, subject in that case to be reimbursed as hereinafter mentioned."

Sec. 580 provides that "The council of the municipality in which the deepening or drainage is to be commenced shall serve the head of the council of the municipality into which the same is to be continued . . . with a copy of the report, plans, specifications, assessment and estimates of the engineer or surveyor aforesaid, and *unless the same is appealed from as hereinafter provided, it shall be binding on the council of such municipality.*"

And sec. 581 of the Act provides that "The council of such last mentioned municipality shall within four months from the delivery to the head of the corporation of the report of the engineer or surveyor, as provided in the preceding section, pass a by-law or by-laws to raise such sum as may be named in the report, or in case of an appeal for such sum as may be determined by the arbitrators, in the same manner and with such other provisions as would have been proper if a majority of the owners of the lands to be taxed had petitioned as provided in sec. 570 of this Act."

The provisions in relation to the appeal referred to in sec. 580 are contained in sec. 582 of the Act, and, so far as material, are as follows: "The council of the municipality into which

the work is to be continued . . . may within twenty days from the day on which the report was served appeal therefrom, in which case they shall serve the head of the corporation from which they received the report with a written notice of appeal; such notice shall state the ground of appeal, the name of an engineer or other person as their arbitrator, and shall call upon such corporation to appoint an arbitrator in the matter on their behalf within ten days after the service of such notice."

It is not in dispute that what purported to be a copy of the engineer's report, plans, specifications, assessment and estimates, was served on the head of the council of the defendant municipality, and that the defendants did not appeal therefrom; nor is it in dispute that after presentation to the plaintiffs of the petition praying for the doing of the work in question, the engineer made no examination of the creek in which such work was to be done, nor did he make plans and estimates of the work nor an assessment of the real property to be benefited thereby. What he did was to re-write the report, re-date the plans, etc., and copy the assessment prepared and made by him some two years before for a former by-law—afterwards set aside as invalid—passed by the plaintiffs to authorize the doing of the work authorized by the by-law in question.

The rule applicable to actions founded upon the statute, as this is, is that there can be no liability unless the preliminary steps prescribed by the statute have been complied with. This rule is very clearly laid down by Mr. Justice Gwynne in the case of *McKillop v. Logan* (1899), 29 S.C.R. 702, in the following language: "In an action of this nature, it is, I think, the undoubted right of every person upon whom such a statutory debt is sought to be imposed, to insist that the plaintiff should establish by incontrovertible evidence that the provisions prescribed as necessary to the creation of the debt claimed have been complied with in the minutest particulars."

That was an action in which the plaintiffs sought to recover from the defendants a sum of money claimed to be due to the plaintiffs as a statutory debt in virtue of the provisions of "The Ditches and Watercourses Act." Also see Dillon on Municipal Corporations, 4th ed., sec. 769, p. 941.

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For the plaintiffs it is said that, even if the engineer failed to comply with the requirements of sec. 570, yet, having regard to the language of sec. 580, what he in fact did must be looked upon as a compliance with sec. 570, and, therefore, binding on the defendants.

Under sec. 570 it was clearly the duty of the engineer to—
(1) make an examination of the creek from which it was proposed to remove obstructions; (2) make plans and estimates of the proposed work; and (3) make an assessment of the real property to be benefited by such work, stating as nearly as might be what, in his opinion, would be the benefit which every road and lot or portion of lot would derive from the proposed work.

The manifest purpose of the Legislature in requiring the engineer to make such an examination was that he might acquire information which would enable him not only to prepare plans and estimates of the proposed work, but also to determine the gross amount to be assessed against roads and lots for the cost thereof.

If the construction sought to be put upon sec. 580 by the plaintiffs be the true one, then if what purports to be a copy of the report, plans, specifications, assessment and estimates of an engineer appointed under sec. 570 is served upon the head of the council of a municipality into which a proposed work is to be continued, and not appealed from, it would become binding on the council of such municipality, and they, under sec. 581, would be required to raise the sum named, even although, as here, the engineer after his appointment by the council neither made an examination of the locality in which the proposed work was to be done nor an assessment after examination of roads and lots or parts of lots which would derive a benefit from such work.

This could not have been the intention of the Legislature. It seems to me that sec. 580 contemplated a substantial compliance by the engineer with the duties cast upon him by sec. 570. It cannot be that a copy of a report, plans, assessment, etc., made by an engineer two years before the plaintiffs were authorized to appoint him to do the work in question, can be regarded as a performance by him of his duties under sec. 570.

In *In re Robertson and North Easthope* (1888), 15 O.R. 423, at p. 431, my brother Street, in my opinion, correctly states the duties of an engineer appointed under the last named section in relation to the assessment thereby directed to be made, thus: "The duties imposed upon the engineer are, to a certain extent, judicial in their character, and are such as he alone should perform. He is not, it is true, required to do with his own hand all the work from its inception to its completion, and he is at liberty, if he deem proper, to employ assistants; but the work of *examining and assessing* the several parcels of land affected, for their due proportion of the cost of the drain, should be done by himself or under his immediate direction."

Persons whose lands may be assessed for the cost of such a work are, as it appears to me, entitled to have not only the character of the work itself but their liability in respect of the cost thereof ascertained by the engineer after and not before his appointment by the council to do the acts which the statute requires him to do.

I think there was no assessment by the engineer within the meaning of the last mentioned section, and that sec. 580 was not intended to give and does not give validity to the so-called assessment.

The appeal, in my opinion, should be dismissed and the judgment of the trial Judge affirmed.

*The Court being divided in opinion, the
appeal was dismissed.*

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ROBINSON V. TORONTO RAILWAY COMPANY.

Negligence—Street Railway.

The motorman of an electric car is not necessarily guilty of negligence because he does not at once stop the car at the first notice that a horse is being frightened either at the car or at something else. All that can be expected is that the motorman shall proceed carefully, and it is in each case a question whether that has been done.

Upon the facts of this case the majority of the Court held that there was no evidence to justify a finding of negligence and set aside a judgment in the plaintiff's favour.

Judgment of Falconbridge, C.J., reversed.

APPEAL by the defendants from the judgment at the trial.

The plaintiff sued the defendants, who are an incorporated street railway company, to recover damages for personal injuries caused, as was alleged, by the negligence of the servants of the defendants while operating one of their gravel cars. The case was tried before Falconbridge, C.J., K.B., and a jury who found in favour of the plaintiff and assessed the damages at \$600.

No questions were given to the jury to answer but they, on rendering their verdict, stated, "We find that the motorman was negligent in not bringing the car to a standstill. We think he could have avoided the accident by doing it, and we assess the damages at six hundred dollars." The learned Chief Justice thereupon directed judgment to be entered for the plaintiff for the sum so assessed. The facts are stated in detail in the judgments.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 24th of September, 1900.

James Bicknell, for the appellants

Riddell, Q.C., for the respondent.

May 14. ARMOUR, C.J.O. :—In *Parfitt v. Lawless* (1872), L.R. 2 P. & D. 462, Lord Penzance said : "I conceive, therefore, that in judging whether there is in any case evidence for a jury,

the judge must weigh the evidence given, and must assign what he conceives to be the most favourable meaning which can reasonably be attributed to any ambiguous statements, and determine on the whole what tendency the evidence has to establish the issue. . . . It is not intended to be said that he upon whom the burden of proving an issue lies is bound to prove every fact, or conclusion of fact, upon which the issue depends. From every fact that is proved legitimate and reasonable inferences may, of course, be drawn, and all that is fairly deducible from the evidence is as much proved for the purpose of a *prima facie* case as if it had been proved directly. I conceive, therefore, that in discussing whether there is in any case evidence to go to the jury, what the Court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue."

And in *Wright v. Midland R.W. Co.* (1884), 51 L.T.N.S. 539, Field, J., said: "Now, first of all, when is there any question for the jury? First of all, if there is a conflict of fact, there is clearly a question for the jury, and the judge has to leave it to them immediately. If the facts are admitted on both sides, but the inferences are disputed, then the judge will consider whether he ought to leave the inferences to the jury. If they are such as an intelligent man, nay, even a stupid man, on the jury might draw, then I should not nonsuit. I cannot put myself in the place of a better man and say, 'I am a better man than you are.' If I do come to the conclusion that even a stupid man on the jury might honestly draw the proper inference, then I should leave it to the jury. I might go a step farther; I might have a strong, as I have very often a strong, preponderating view that the evidence ought to be believed only on one side, and that one side ought to succeed, yet, though my views may be as strong as possible, I must leave it to the jury. Now when may I take the case into my own hands? I say I may take it into my own hands when no reasonable jury, acting fairly and impartially between the plaintiff and the defendant, ought to draw, or would draw, any but one conclusion, and that conclusion is conclusive against the plaintiff; then I must take the case into my own hands."

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In *Brown v. Great Western R.W. Co.* (1885), 1 Times L.R. 614, Lord Justice Bowen said: "Whenever facts which are not in conflict admit of two reasonable constructions, one in favour of the plaintiff, the other in favour of the defendant, it is for the jury and not for the judge to draw the inference. On the other hand, where the facts admit of but one reasonable construction, it is for the judge to decide the case upon the only ground on which it can be decided by any reasonable man."

And in *Metropolitan Railway Company v. Jackson* (1877), 3 App. Cas. 193, the Lord Chancellor (Lord Cairns) said: "The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred."

I cite these decisions as shewing the principles that should govern in deciding the question whether there is in any case evidence proper to be submitted to the jury.

I presume that everyone will agree in the correctness of the principles so laid down, but it is in the practical application of them that differences of opinion arise, and we find judges constantly differing as to whether the same facts do or do not afford evidence proper to be submitted to the jury, and this is especially the case in actions for negligence.

Nonsuits are erroneously granted in such actions for the most part because the judge, instead of merely determining whether any facts have been established by evidence from which negligence may be reasonably inferred by the jury, determines that from the facts established by evidence he would not infer negligence and consequently that the jury ought not to infer it, ignoring the principle that "it is not for him to answer the question whether there has been negligence" and the fact that "in ninety-nine cases out of a hundred he is not so competent to answer it as a jury," and unmindful also of the fact that his mind by education and habit is trained to reject inferences and to require strict proof of every fact and is thereby rendered less competent to draw reasonable inferences than minds not so trained, and measuring the competence of the

jury in this respect by his own: *Wakelin v. London and South Western R.W. Co.*, [1892] 1 Q.B. 190.

When we find so great a judge as Lord Esher who joined in upholding the nonsuit granted at the trial in *Davey v. London and South Western R.W. Co.* (1883), 11 Q.B.D. 213, 12 Q.B.D. 70, on the ground that there was no evidence to go to the jury, afterwards, in *Wright v. Midland Railway Co.* (1885), 1 Times L.R. 406, saying: "If it pleases anybody to hear it, I have doubted ever since I gave that judgment whether my brother Baggallay and my brother Manisty" (who dissented) "were not more right than we were. I have doubted whether, even in that case, we ought to have taken it from the jury," and subsequently in Michaelmas Term, 1890, on *Davey's* case being cited, saying he hoped he should never hear that case cited again as he was now of opinion that the judgment of Baggallay, L.J., was right, a trial judge ought to hesitate before withdrawing a case from the jury.

And much more ought we to hesitate before determining that no facts have been established by evidence from which negligence might be reasonably inferred by the jury in a case where the trial Judge, who has had the advantage, which we cannot have, of hearing the facts deposed to and considering not merely what inferences the jury might reasonably draw from the facts themselves but also what inferences they might reasonably draw from the manner in which the facts were deposed to and the demeanour of the witnesses in deposing to them, has held that there was evidence from which negligence might reasonably be inferred by the jury, and when the jury have found that negligence ought to be inferred from such evidence.

In this case the learned trial Judge ruled emphatically that he could not withdraw it from the jury and the jury found "that the motorman was negligent in not bringing the car to a standstill and that he could have avoided the accident by doing it."

We cannot take this case into our own hands and dismiss the action under the provisions of Consolidated Rule 817 unless there was absolutely no evidence of negligence proper to be submitted to the jury: *Millissich v. Lloyds* (1877), 36 L.T.N.S.

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The plaintiff was being driven in a phaeton buggy with one horse eastward along Queen Street east and an empty car of the defendants, called by some of the witnesses a gravel car, by others a sand car, was being propelled westward upon the railway track of the defendants along the same street.

This car was described by the motorman upon it as "being built on the same principle as one of these railroad coal cars—flat top car with a box on it with four uprights on the centre of the car to hold the trolley stand and pole," and was thus described by the plaintiff. "Well, it seemed to be a great big square box on it and some great big sticks on it, and I thought it was frightful," and was thus described by the plaintiff's witness: "It had a kind of frame work in front, scantlings, up and down and across, two scantlings up this way and one across the top. I think I never saw but one or two of them; it had scantlings in front and a kind of frame work."

This car was in charge of a conductor and a motorman, no one else being on it.

The horse with which the plaintiff was being driven by one Porteous who owned it was a lively one but quiet and accustomed to and not frightened at the ordinary street cars of the defendants, but when within about three car lengths from this approaching car he became very much frightened at it.

The following evidence was given by the plaintiff on direct examination:—

"Q. You say you screamed to them? A. Yes. I shouted to them to stop. Q. Loud? A. Yes. As loud as I could. Q. Was the car plainly in sight? A. Yes. Q. Could the motorman see you? A. Yes. Q. Any one else scream? A. Mr. Porteous hollered for him to stop. Q. Do you know if the motorman heard; did you see anything? A. I thought he heard because he seemed to be laughing when I was shouting. Q. Can you tell what speed the car was going at? A. I don't think I could tell. Q. Did it slacken its speed; did he put on

the brakes or anything? A. I could not tell really? Q. But when you sung out and so on? A. No. It did not seem as if it slackened up. Q. Did you see him do anything in the way of trying to stop it? A. No. Q. You say you saw him laughing? A. Yes." And the following on cross-examination. "Q. I am not sure whether you said to my learned friend that the car was about as far as the end of this room or twice as far? A. I am not supposed to know that, but I should judge—it seems to me that they had ample time to stop."

The following evidence was given by Porteous on direct examination:—

"Q. How far was this car from you when the horse got frightened? A. It would be about three lengths of the car I think; I could not tell you the distance but it looked to me to be far enough that I considered that they could stop easily enough until I got out and held the horse and kept it quiet, but I could not get out. Q. But at the first when the thing first started, when the horse began prancing and rearing? A. I yelled to them to stop as loud as I could. Q. Did they do anything? A. I could not observe, but they were smiling and laughing when I saw them. Q. Laughing at the horse? A. I don't know what they were laughing at; laughing at something. Q. Did you see them attempt to put on the brake or anything. A. I did not see them put on the brake, but I know they must have put the brake on otherwise we would all have been killed. Q. When in your judgment did they commence to put the brake on? A. Not till they were pretty close. Q. Not when you first called to them? A. No. Q. How close were they when you say your horse first started prancing and jumping? A. I would judge about three lengths or more of the car. Q. Do you know the rate of speed? A. I do not know that; I suppose the usual speed they always go. Q. Did the speed slacken at that time at all? A. Well, I don't know that it slackened much till it came pretty close, till the horse turned round then it slackened. Q. It struck the waggon? A. It struck the front wheel of the buggy and squashed the opposite wheel down and Mrs. Robinson was sitting on that side and she fell out." And the following on cross-examination: "Q. And it stopped just about the time it reached you? A. Just

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about the time. Q. So that you say the motorman must have put on his brake at some time before the horse got on the fender? A. Yes, he must have put his brakes on otherwise, the car would not have stopped. He did not put them on quick enough. Q. The motorman got off the car and asked for your names? A. Yes. Q. You refused to give your names? A. I told him he would get my name soon enough; that he ought to have stopped the car. Q. What is that? A. I said 'You will get my name soon enough; you ought to have stopped this, or this would not have happened.'

The following evidence was given by the motorman on direct examination: "Q. Will you tell the jury how it happened? A. I had been down to Munro Park. Returning about a quarter of a mile this side of the Kingston Road I noticed a rig coming up that way on the south track. We were on the north track. They were coming east, we were going west. When we got within a couple of car lengths, or two and a half car lengths, perhaps three, the horse gave a little shy to the south and the driver yanked him back and pulled him a little too far I guess; pulled him over on to the track. I put on the brake, I had thrown off the power before this. I put on the brake and I saw that was not going to stop the car in time and I immediately reversed the car, and the car took the reverse pretty good. It just seemed to me that the minute the horse got to the fender the car got the reverse. I don't think there was two feet difference. Q. When did you commence to put on the brake? A. As soon as I saw the horse shy. Q. Was there anything you could have done to stop the car that you did not do? A. Not anything that I could do. Q. Were you keeping a steady watch out? A. I saw the horse coming for a couple of hundred yards. Q. Had you any apprehension that he would shy? A. No, indeed I had not. Q. Until you saw him actually shy? A. Yes. Q. And then you took the steps you told of to bring your car to a standstill? A. Yes."

And the following on cross-examination: "Q. What rate of speed were you running at when you first saw the horse? A. I should judge about eight or ten miles an hour. Q. What is the reverse for? A. To reverse the car. Q. You put on the reverse just as the horse struck the fender? A. It took effect

then. Q. It takes effect instantly? A. Yes. Q. Then when you put on that reverse were you two feet from the horse? A. I might have been more. Q. I am not asking you what you might have been. A. I have seen cars go over a car's length after the reverse. Q. Were you two feet away from the horse when you put that reverse on? A. Yes. Q. Will you swear to three? A. Yes, I was more than three feet away. Q. Were you four? A. Probably I was. Q. You will not go over four feet? A. Well— Q. Will you swear to more than four feet when you put the reverse on? A. I don't remember just how far it was when I put the reverse on. I know that the reverse took effect. Q. But it takes effect instantly? A. Well, it takes effect instantly; when you reverse the car the machine instantly revolves the other way; the machinery starts the other way. That does not say that the wheels grip the other way. Q. Did you put the reverse on more than five feet away? A. Yes. Q. Six feet? A. I will not say more than five feet. Q. How far were you away when you put the brake on? A. About two car lengths. Q. How far did you go before you put the brake on? A. The instant that I saw the horse shy I put the brake on. Q. You swear that you put the brake on two car lengths away; you swear that you saw the horse prancing? A. Two or three car lengths. Q. Was it three car lengths? A. I do not think it was three. Q. Were you laughing after they called to you? A. I was not. Q. Did you hear him call to you? A. I never heard his call, I heard the woman screaming. Q. She was screaming with terror? A. Yes. Q. You did not put on the reverse until five feet? A. I thought I could stop it with the brake; and another thing, when you put the reverse on when the car is at full speed sometimes it will not take it; you have to use your judgment. Q. And you did not put on the reverse until the car had gone at least sixty feet. A. It had not gone sixty feet; I say the horse shied at two car lengths. Q. The reverse took within five feet and stopped? A. It stopped when it came to the horse. Q. So that if you had put it on when you first saw the danger coming you swear it would not have stopped within ten feet? A. I could not swear that it would have stopped at all, because if you put the reverse on when the car is going at speed the wheels buzz on the track and do not take hold. Q. You

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cannot pledge your oath that if you had put on the reverse when you first saw the difficulty the accident would not have happened? A. I would not want to take my oath either way on that."

The following evidence was given by Porteous in reply on direct examination: "Q. It is said that you pulled the horse back on the track or the horse would not have got there. A. I did not pull it. It is not likely that I would pull the horse in front of the car and run the risk of breaking my neck," and the following on cross-examination: "Q. You had the reins in your hands all the time? A. Yes. Q. You were pulling the horse and doing the best you could with it. A. I was trying to get it away from the car. Q. You were excited at the time and nervous and worried, and you were pulling the horse in some way? A. Certainly I was pulling it off the track. Q. And you were pulling the reins in some way. A. Why certainly I was pulling the reins."

The defendant company has not the same rights upon the highways upon which their tracks are laid as the public have. They have such rights and such rights only as are conferred upon them by their Act of Incorporation, and they are bound to exercise those rights with a due regard to the rights and safety of the public.

"The control and management of an instrument of danger to life or limb has always been considered as calling for a higher degree of skill or care as the measure of what is reasonable than when no such serious consequence is to be apprehended": *Halifax Electric Tramway Co. v. Inglis* (1900), 30 S.C.R. 256.

Negligence is the want of due care under the circumstances, and the more dangerous the circumstances the greater the care required to be taken, the required care increasing as the danger increases.

The defendant company were causing to be propelled along their railway a car of unsightly and unusual appearance, one not in common use and unlike their passenger cars to which horses had become accustomed, and one calculated from its appearance to frighten horses, and were causing it to be propelled at the rate of from eight to ten miles an hour along the

highway. The motorman saw the horse when it first became frightened, and saw that it had become unmanageable by its driver: *Watkins v. Reddin* (1861), 2 F. & F. 629; *Powell v. Fall* (1880), 5 Q.B.D. 597; *Galer v. Rawson* (1889), 6 Times L.R. 17.

These circumstances alone, in my opinion, afforded evidence from which the jury might have reasonably inferred negligence on the part of the motorman.

The motorman swore that he applied the brake the instant he saw that the horse was frightened. Porteous swore that he did not. Which was the truth was for the jury to determine. If they found that what Porteous said was the truth, in that case there was evidence from which they might have reasonably inferred negligence on the part of the motorman.

But in addition to all this, it is quite plain from the evidence that had the motorman instead of applying the brake applied the reverse the collision would not have occurred. There was no reason, mechanical or otherwise, why he should not then have applied the reverse, for he had thrown off the power, and his not doing so was undoubtedly evidence from which the jury might reasonably have inferred negligence.

If we should allow this appeal we would, in my opinion, be simply usurping the functions of the jury and substituting our own standard of negligence for what it is their province alone to find.

There is another ground upon which, in my opinion, the plaintiff is entitled to hold her verdict, and that is that the running of such a car by the defendants was not within the express powers conferred upon them by the Legislature, and no evidence was given by the defendants to shew that the use of such a car was within any of their implied powers.

In my opinion the appeal should be dismissed with costs.

OSLER, J.A.:—Having carefully examined the record of the proceedings at the trial I am compelled to hold that there was no evidence of negligence proper to be submitted to the jury. The car seems to have been about three car lengths from the vehicle in which the plaintiff was sitting when the horse first exhibited symptoms of alarm. He did not appear

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to be out of control, and it is quite out of the question to impose upon the defendants the obligation or duty to stop their car at the first notice that a horse is being frightened either at the car or at something else. All that can be expected is that the motorman shall proceed carefully. In the present case he began to slow up the car, and it was finally brought to a stop just as the animal dashed across the road against it. Considering the shortness of the distance between the car and the plaintiff's vehicle, that the motorman was proceeding very slowly, and was, having regard to the situation, stopping altogether just as the vehicle collided with the car, I do not see how it was possible to say that he was negligent or that negligent conduct on his part in the management of the car caused the accident. At the very most it might be said that it was an error of judgment on his part in not stopping sooner, but that is not enough to fix the company with liability.

I do not presume to doubt the entire accuracy of the passage quoted from Lord Penzance's judgment in *Parfitt v. Lawless*, L.R. 2 P. & D. 462. I only think that there is nothing in the present case which fits it.

I would, therefore, allow the appeal.

I must add that no point was made at the trial or on the argument of the appeal as to the right of the defendants to run such a car as the one in question.

MACLENNAN, J.A. :—I agree with the judgment just read.

MOSS, J.A. :—The testimony adduced in support of the plaintiff's case shews that the vehicle in which she was being driven by Porteous was proceeding easterly along Queen Street upon the roadway to the south of the southerly track of the defendants' line of railway. The horse was a quiet animal, accustomed to the street and its sights and sounds. A gravel car in charge of a motorman and conductor in the employ of the defendants was coming towards the west upon the northerly track. When about three cars length—about 100 or 120 feet—from where the vehicle was, the horse suddenly and without preliminary warning became fractious and backed the vehicle across the southerly track, over the devil strip and on to the

northerly track. Being then urged or whipped up by Porteous, he plunged over to the southerly boulevard and, making a quick turn, rushed to the north across the tracks. As he reached the north tracks the car came to a standstill. The horse's foot became entangled in the fender, the right front wheel of the vehicle struck the car, the left front wheel was broken, and the plaintiff, who was sitting on the left side, was thrown out and injured. Porteous says the car was moving "at the usual speed" when the horse first became fractious. It was not going at an unusual speed, nor was there anything in its movements to attract special attention to it. The occurrence was unexpected and sudden, and the whole thing was over in a very short space of time. Nobody had any reason for supposing that the horse would behave as he did until he commenced to back. After he did shew fractiousness the car was brought to a standstill by the time it had reached the place in the road to which the horse had come in his forward and northward movement, and was probably motionless when the horse's foot struck the fender. There is nothing to shew that the men did not do all that they reasonably could to avert the accident by stopping the car as quickly as possible after the horse's actions made it apparent that it was necessary to do so. The only reason that appears for the vehicle coming into contact with the car was that the latter was on the highway, as it lawfully might be. I am unable to see in this anything on which to base a charge of negligence against the defendants.

If the evidence on the defendants' behalf is looked at it appears that the motorman upon seeing the horse behaving in a fractious manner at once applied the brake and having thus slowed the car to an extent sufficient to justify applying the reverse current, slackened the brake and applied the current. This appears to be the correct practice, the application and subsequent slackening of the brake being necessary in order to efficiently apply the reverse current.

The evidence for the defence does not strengthen the plaintiff's case, and I am of opinion that upon the testimony in chief no case was made for submitting the question of negligence to the jury.

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With great deference to those who differ, I am in favour of allowing the appeal.

LISTER, J.A.:—The single question is whether there was evidence upon which the jury might reasonably have found as they did.

The evidence for the plaintiff is that while she was being driven by one Porteous in a one horse buggy east along Queen Street in the city of Toronto on the south side of the tracks of the defendants' railway, they met one of the defendants' gravel or sand cars coming west. It was a flat car with a box on it; in the centre of the box were four uprights projecting above the box and used to hold the trolley stand and poles. When the car was from sixty to one hundred feet from the buggy, the horse became frightened and unmanageable, and persisted in backing on and off the track. Porteous, who was called as a witness for the plaintiff, says that he was driving south of the track; that the horse became frightened and unmanageable at the sight of the defendants' car and backed over the south track across the "devil's strip" on to the north track; that it then went to the boulevard, made a wheel, and jumped straight in front of the north track again, and got his foot in the fender just as the car stopped. He also says the car struck the side of the buggy and threw the plaintiff out on to the road, occasioning the injuries complained of. Both she and Porteous say they shouted to the men on the car to stop; that the men seemed to be laughing, and that the speed of the car was not slackened until it was within a few feet of the horse.

The plaintiff charges that when the men who were operating the car saw that the horse was frightened and unmanageable it was their duty to have at once diminished its speed and stopped it in time to avert the accident, and that in failing to do so they were guilty of negligence.

The motorman and conductor of the car in question appear to be the only other persons who saw the accident, and both were called as witnesses for the defence. The former said that he saw the horse and buggy a couple of hundred yards from the car; that he had no apprehension of danger until the car was about three lengths of itself from the horse, when he saw

it shy; that thinking he could stop the car with the brake he at once put it on, but finding that he could not stop it in time to prevent an accident, he, when the car was about four feet from the horse, "reversed," with the result that the car was almost instantly stopped. The evidence of the conductor differed from that of the motorman as to what was done to stop the car. He said the motorman reversed from the first, then started up slowly, and then reversed again and stopped. Both the motorman and conductor contradict the plaintiff and her witness Porteous with reference to the car colliding with the buggy, and also as to the plaintiff being thrown out of the buggy on to the road. They say the plaintiff jumped out of the buggy on to the road and stood there, and that there was no collision.

The nature of the injuries which the plaintiff sustained, as described not only by herself but by the medical witnesses called on her behalf, point to the conclusion that she was thrown from the buggy and did not jump out of it as sworn to by the defendants' witnesses.

The evidence establishes that Porteous had entirely lost control of the horse; that it was backing on and off the tracks; that the men operating the car saw that it was unmanageable and the occupants of the buggy in danger; and, in my opinion, it also establishes that the car could have been stopped before it reached the horse.

While it is true that in cases such as this there is no rule of law which requires a motorman operating a car to at once stop at the sight of a frightened horse on the public highway, it must always be a question for the jury to determine whether, under the circumstances of each particular case, not using every appliance provided for slackening the speed of or entirely stopping a car and thereby averting an accident does or does not amount to negligence. The rights of a driver of a horse and the manager of an electric car as regards the use of the street are, in my opinion, correctly laid down by Knowlton, J., in *Ellis v. Lynn and Boston Railroad* (1894), 160 Mass. 341, in these words: "The motorman is supposed to know that his car is likely to frighten horses that are unaccustomed to the sight of such vehicles. . . . It is his duty, if he sees a horse in

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the street before him that is greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse, and it is also his duty in running the car to look out and see whether, by frightening the horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams. In this way the convenience and safety of everybody can be promoted without serious detriment to anybody. Of course the owners and drivers of horses are required at the same time to use care in proportion to the danger to which they are exposed."

The whole question was fairly submitted to the jury, and I am unable to say that there was no evidence to warrant a finding by them that the defendants did not use that degree of care and prudence which the circumstances required. I think the appeal should be dismissed.

*Appeal allowed, ARMOUR, C.J.O., and
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[IN THE COURT OF APPEAL.]

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Will—Construction—Tenant for Life—Carrying on Business—Profits.

A testator devised and bequeathed all his property real and personal to his wife "to be used and enjoyed by her for and during the term of her natural life and widowhood, and after her decease or marrying again" to named members of his family. At the time of his death he was carrying on business as a brickmaker upon premises leased by him, he having the right to take clay. The widow, with the assent and co-operation of members of the family, carried on the business and developed it, using the plant and renewing it when necessary, and when the lease fell in some years after the testator's death, she took a new lease of the same and other premises, and at her death the business had increased very much in value:—

Held, by the majority of the Court, that the personal estate should have been converted into money and not used in specie by the widow, but that having been so used the increased value of the business enured to the benefit of the remaindermen and did not form part of the widow's estate.

Judgment of a Divisional Court, 32 O.R. 36, affirmed.

APPEAL by the defendant Frederick Wakefield from the judgment of a Divisional Court [Boyd, C., Robertson, and Meredith, JJ.], reported 32 O.R. 36.

The appellant was the executor of the estate of his mother, Mary Wakefield, wife of William Wakefield, who had devised to her all his property real and personal, "to be used and enjoyed by her during the term of her natural life and widowhood." She had carried on and developed the testator's business of brickmaking, and the question was who was entitled to the increased value. The will in question is set out in the report below, and the facts are also there referred to.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 14th of September, 1900.

F. E. Hodgins, and *Emerson Coatsworth*, for the appellant. The meaning of the will is that the property is to be used and enjoyed in specie and not converted, and whatever the testator could have done the tenant for life was entitled to do. She, therefore, was justified in carrying on the business and using the plant and clay, and the business ceased to be that of the testator. The brick on hand at the time of his death and the

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machinery and plant were his capital, but the debts were more than this and there was no surplus with which the widow could be charged: *In re Bland*, [1899] 2 Ch. 336; *Collins v. Collins* (1833), 2 My. & K. 703; *Bethune v. Kennedy* (1835), 1 My. & Cr. 114; *Pickering v. Pickering* (1839), 2 Beav. 31; *Groves v. Wright* (1856), 2 K. & J. 347. The tenant for life had the right to use the clay: *Greville Nugent v. Mackenzie*, [1900] A.C. 83; *Dashwood v. Magniac*, [1891] 3 Ch. 306; and the profits resulting from her care, skill, and labour go to her. The additional land leased by her is not in any way subject to the will: *Giddings v. Giddings* (1827), 3 Russ. 241. This is quite different from the case of a business carried on by a trustee or personal representative, where of course the profits would go to the beneficiaries.

Murphy, Q.C., and *R. G. Smyth*, for the adult respondents. The case is really the simple one of a trustee, or *quasi*-trustee, risking the trust funds in a precarious business and being fortunate enough to make a profit. The widow should have converted the property into money and have contented herself with the interest derived therefrom; not having done so, the remaindermen are entitled to take the property as it is and the benefit of the increased value goes to them. It was only because she was holder of the testator's business that the widow was able to obtain the extended lease, and that extended lease also, therefore, must be treated as an accretion to the business for the benefit of the remaindermen: *Bisset on Estates*, p. 248; *Phillips v. Phillips* (1885), 29 Ch. D. 673; *Lewin on Trusts*, 10th ed., p. 438.

Armour, Q.C., for the infant respondents. The widow was undoubtedly carrying on the testator's business, and while she was under no obligation to increase its value, still having done so she cannot divide the value, but must let the business go in its present condition to the remaindermen. She was entitled to the increased income, but the increased capital forms no part of her estate: *Bate v. Hooper* (1855), 5 D. M. & G. 338; *Dimes v. Scott* (1827), 4 Russ. 195.

Hodgins, in reply.

April 22. ARMOUR, C.J.O.:—I have no doubt that the mental intention of the testator was that his widow should use and enjoy his property just as he had used and enjoyed it, and should carry on the business carried on by him just as he had carried it on for the support of herself and family, but unfortunately he failed to express such intention in his will, for I am unable to find in it any indication of his intention that his widow should use and enjoy his personal property in specie.

The rule, therefore, laid down in *Howe v. Earl of Dartmouth* (1802), 7 Ves. 137, must be held to apply to this will, for, as was said by James, L.J., in *Macdonald v. Irvine* (1876), 8 Ch. D. 101, at p. 124: "It is quite clear that the rule must be applied unless upon the fair construction of the will you find a sufficient indication of intention that it is not to be applied; the burden in every case being upon the person who says the rule of the Court of Chancery ought not to be applied in the particular case."

The personal estate, therefore, of the testator ought in obedience to this rule to have been converted into money immediately after the death of the testator, and after payment of his just and lawful debts and funeral and testamentary expenses, to have been properly invested, and the interest therefrom arising to have been paid to his widow during her life, and after her death to have been divided as by the will directed.

It was said by Lord Cottenham in *Pickering v. Pickering* (1839), 4 My. & Cr. 289, that "great injustice would be done if, where there is nothing in the will but a tenancy for life and a remainder, it is always to be held that the property is to be at once converted," and I think injustice would have been done in this case if the rule had been observed and the personal property had been at once converted, having regard to the quantity and quality of the personal estate and the condition of the testator's family.

The personal estate was of small value, and the terms of years in the brickyard and in the land adjoining, it was shewn, would not have brought anything if offered for sale, and the full value could not likely have been obtained for the residue

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of the personal estate, and the widow would have only had the rent of the real estate, after paying the interest on the mortgage and the taxes, and the interest on the proceeds of the personal property when invested, to pay house rent and support herself and family, the three youngest of the children, George, Edward, and Mary Kate being under age, the last being about twelve years old.

The widow, after the testator's death, desiring to keep the family together and to find them employment, continued the business carried on by the testator in her own name, and to enable her to do so, four of her sons who had been working for the testator for wages, namely, Henry, Frederick, Walter Robert and Philip, executed a release to her of all their claims for wages against the testator.

And I think it must be held that the widow continued the business in her own name with the assent of Henry as well as with the assent of the rest of the family.

Henry died on the 29th March, 1883, leaving the plaintiff Jane, his widow, and the plaintiffs Rosa and Sarah, and the defendants Annie Kate and Florence, his children him surviving.

The widow continued to carry on the business until her death on the 23rd of March, 1899, without objection from any one of her sons except William and Henry; and her daughters all living with her and her sons, except William and Henry, being employed in the business, Frederick managing the business for his mother without any stated wages or salary, and the other sons being paid wages and paying their board, and the daughters being paid no wages.

The sons who were paid wages cannot be regarded as merely hired servants, for they were working with a natural interest in the success of the business.

The result of this co-operation of all the family and of their industry, care, skill, and management was to greatly augment the said business and the profits derived therefrom.

I do not think that the carrying on of the testator's business by his widow can be treated as a breach of trust by Henry's representatives, because it is plain that Henry assented to her doing so, but his assent to her doing so could not prejudicially affect his reversionary interest in the business and the profits to

be derived therefrom: *Docker v. Somes* (1834), 2 My. & K. 655; *Vyse v. Foster* (1872), L.R. 8 Ch. 309.

But I think that in ascertaining the share of the business and of the profits derived therefrom to which Henry's estate is entitled, a deduction should be made from such business and profits of the value of such co-operation, industry, care, skill and management.

The terms of years of the brickyard and of the eighteen acres adjoining it having been renewed from time to time by the widow, the tenant for life, enure to the benefit of the remaindermen.

I do not think it necessary for me to go further and state in detail the results of the opinions I have expressed, for the respondents are content with the judgment of the Divisional Court as it stands, and I do not think that I can better the position of the appellant.

The appeal will therefore be dismissed with costs.

OSLER, J.A.:—I wrote a judgment in this case some time ago, which has been mislaid. As judgment is now ready to be delivered, I will not delay the disposition of the case in order to state my views at length. It is enough to say that after having examined the authorities, including the recent case of *Myers v. Washbrook*, [1901] 1 Q.B. 360, and given the arguments of counsel the best attention I have been able to bestow upon them, I am of opinion that we cannot interfere with the judgment of the Divisional Court. It goes quite as far in the appellant's favour as the authorities warrant. I would therefore affirm for the reasons given in the judgment of the Chancellor.

MACLENNAN, J.A.:—I am of opinion that upon the true construction of this will the widow was entitled to the use of the testator's estate specifically for her life or widowhood. The testator appoints her and another to be executors, and directs the payment of his debts by them; but he gives all his property, real and personal, directly to her alone, "to be used and enjoyed by her" for and during, etc., and after her decease or marriage, "to" ten of his children, "share and share alike." I think that

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this language, having regard to the nature of his property, indicates sufficiently an intention that the widow was not only to have a legal right and title for life, but also that she was to be entitled to use and enjoy it specifically. The cases on the subject are very numerous, and are collected in 2 Williams on Executors, 9th ed., p. 1252, and I think they warrant the conclusion to which I have been led.

The question then arises how the widow, or the appellant as her executor, and as representing the testator's estate, ought to account to the plaintiffs as tenants in remainder.

In the first place, it is clear that the lease, which existed at Mrs. Wakefield's death, and which she had obtained by successive renewals from William Washington, and all, if any, permanent improvements made thereon by the widow, are to be regarded as grafts upon the original leases which belonged to the testator at the time of his death, and to be the property of the persons entitled in remainder: *Keech v. Sandford* (1726), 2 W. & T. L. C., 7th ed., p. 693.

The next question is as to the profits of the business. At his death the testator used a part of the leasehold property by turning the clay found on the land into bricks, tiles, etc., under a license contained in the lease, and there can be no doubt that if the land had been freehold, and the widow had been tenant for life, she would have been entitled to continue the manufacture of bricks, etc., just as her husband had done: *Miller v. Miller* (1872), L.R. 13 Eq. 263. It follows, in my opinion, that being entitled to the specific use of the leasehold in question for life, her right to continue the business for her own profit is clear, and she had also the right to use the plant and machinery which had belonged to her husband. There were some horses also, and some horned cattle, and swine, and also some household furniture. These last three items were not connected with the brick business, and may be considered separately. With regard to the plant, machinery, horses and waggons, and everything connected with the brick business, I see no reason why the widow could not use them until the horses died or became valueless from old age, and until the plant and machinery became worn out and useless, without being accountable to the tenant in remainder. If she sold them or any of them, of

course she would be accountable for the proceeds, even if she did so in order to provide new or better articles of the same kind.

The same observation applies to the horned cattle, swine, and household furniture. If she sold them or any of them she is accountable for the proceeds, but not for similar articles procured to replace them, nor for any which became worn out by use.

Now, if the testator's estate had consisted of nothing but the ground leased from Washington, and the machinery, plant, and other things already mentioned, and if the widow had carried on the brick business with money or means of her own, I think what I have said indicates the nature and extent of the legal accountability of her estate. The stock of manufactured brick, etc., in existence at her death, the plant and machinery, horses, waggons, household furniture acquired by her after her husband's death, and everything not affixed to the soil, would be the property of her estate and not of that of her husband. But the leases themselves would belong to the remaindermen.

But besides the items of property already mentioned, the testator was possessed of other property. He had a valuable leasehold, subject to a mortgage for \$1,500, which was sold in 1889 under an order of Court, and the proceeds divided, and about which there is no further question. There was another piece of freehold land, also subject to a mortgage, which is still unsold, but the mortgage has been paid off by the widow. The testator also had what is described as stock-in-trade, to the value, as is said, of \$2000; book debts and promissory notes, \$1000; money secured by mortgage, \$400; and cash in bank, \$1000 or thereabouts. It is said the stock-in-trade consisted of manufactured bricks, plant, machinery, etc., but did not include the horned cattle, swine, or household furniture. The widow alone proved the will, the other executor having renounced. She transferred the money in the bank into her own name, disposed of the manufactured stock, collected the accounts, and paid off all the liabilities of the testator. Now, it was her clear duty to have placed in some secure state of investment, the money in her hands after paying the debts, and she was not at liberty to use it for her own purposes or in carrying on the tile business.

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I think the effect of the evidence is that she used the money of the estate just as if it had been her own absolutely. That was a clear breach of trust, committed no doubt for want of legal advice, but under circumstances not without much extenuation. She was left with a family of ten children, of whom all but Henry, who had been married for some years, and had been in business for himself, were, as I understand the evidence, living at home with their mother. Neither she nor they had any means of support or livelihood, other than the estate of the testator. They were a united family, and living together as they were, it was not unnatural that they should have thought it right to use the money of the estate for family purposes generally, as well as for the business, so far as was necessary. They seem all to have assisted in carrying on the business, including Henry, until his death in the following year. There is no complaint by any of the other members of the family, and it is Henry's widow and children who alone are seeking the present account.

That there was a breach of trust in using the money of the estate is clear. Ever since the decision of the Court of Appeal in *Docker v. Somes*, 2 My. & K. 655, it has been the law of the Court that a trustee, employing trust money in his own business, contrary to his trust, even in conjunction with money or means of his own, is liable to be charged, at the option of the *cestui que trust*, either with the profits which he has made, or with interest. Before that decision, as stated by the Lord Chancellor (Brougham), there had been no decided case to that effect. In all such cases as had previously occurred, the utmost that had been done was to charge the trustee with interest at five per cent., with annual rests, as was done in *Piety v. Stace* (1799), 4 Ves. 620. The principle has since received emphatic approval in *Vyse v. Foster*, L.R. 8 Ch. 309; L.R. 7 H.L. 318, at pp. 329, 337, and in subsequent cases. The plaintiffs are therefore in this case entitled to an account, if they think it will be to their advantage, of so much of the profit made by the widow in carrying on the business of brick making, as is properly attributable to the use in the said business of any part of the money of the estate. What the result of such an account may be, it is impossible to say. Lord Brougham, in *Docker v. Somes*,

suggests that the reason why previous judgments had been for interest, and not for profits, was the difficulty of ascertaining them. At p. 665 he says: "The reason which has induced Judges to be satisfied with allowing interest only, I take to have been this: they could not easily sever the profits attributable to the trust money, from those belonging to the whole capital stock; and the process became still more difficult where a great proportion of the gains proceeded from skill or labour employed upon the capital. In cases of separate appropriation there was no such difficulty; as where land or stock had been bought and then sold again at a profit; and here, accordingly, there was no hesitation in at once making the trustee account for the whole gains he had made. But where, having engaged in some trade himself, he had invested the trust money in that trade along with his own, there was so much difficulty in severing the profits which might be supposed to come from the money misapplied, from those which came from the rest of the capital embarked, that it was deemed more convenient to take another course, and instead of endeavouring to ascertain what profit had been really made, to fix upon certain rates of interest as the supposed measure or representative of the profits, and assign that to the trust estate."

In this case the lease and the clay were the property of the widow. She had a right to use the plant and machinery, horses, waggons, etc. The labour, and the skill, and the management were all her own. So far as appears, the only thing for which she required money to carry on the business was to pay for labour, which could not be very much until sufficient profits were realised to dispense with money from any other source. In *Vyse v. Foster*, L.R. 8 Ch. 309, James, L.J., at p. 331, enumerates some of the elements of a business to which the profits may be attributable, besides the money which may be employed in it. And see also Lindley on Partnership, 6th ed., pp. 590, 591.

But the difficulty of the account which the plaintiffs seek is greatly increased by the circumstance that the widow herself was tenant for life of the money; and if she had put it out on lawful investments, would herself have been entitled to the whole of the interest and income. If the money had been lost,

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or if she had spent it immediately after her husband's death, her sole liability and that of her estate would have been to restore the capital: *Attorney-General v. Alford* (1855), 4 D. M. & G. 843; *Vyse v. Foster*, L.R. 8 Ch. at p. 333, in which it was laid down that the Court has no power to punish an executor for misconduct, by making him account for more than he actually received, or which it is presumed he did receive, or ought to have received, and that the Court was not a Court of penal jurisdiction. If any one else had been tenant for life, she would have been accountable for interest also, to that person, but being herself tenant for life, and so entitled to the interest which would have been made, she would not be answerable for interest to any one.

But how does the matter of profits stand? If she accounts for profits, she herself, being tenant for life, would seem on principle to be entitled to them. At all events, it seems clear that if the profits amount to more than six per cent. upon the money employed in the business, she should be entitled to six per cent. at least, and the remainderman can only be entitled to the excess, if any. No doubt there are many cases, in which the subject of an investment increases in value, and the remainderman has the benefit of that, just as he would have to bear the loss of a decrease in value. But when it is a question of income, for example, that of an unauthorized loan at high interest, loan and interest all ultimately repaid, how can the tenant for life be deprived of the excess beyond lawful interest, and how can that excess be regarded as part of the capital? Apparently it is not capital, in any intelligible sense, but income; and to make it capital instead of income seems unduly to favour the remainderman to the disadvantage of the tenant for life, where neither of them is trustee, and to penalize the trustee, where the latter is tenant for life. *Re Hill* (1881), 45 L.T.N.S. 126, however, seems to decide that in such a case the tenant for life can only have interest, and whatever profit is made in excess is capital. It may be said that the Court regards an unauthorized loan, or other improper investment, as void—that is, as not a loan or investment at all—and that the high interest or profits are a mere accretion, which the Court appropriates partly to capital and partly to income. I myself

would have preferred the reasoning of Lord Romilly in *Stroud v. Gwyer* (1860), 28 Beav. 130, where he held the tenant for life entitled to the whole of the interest received from an improper investment. But, on the authority of the later decision, I think we may hold that if profits exceeding six per cent. per annum should be shewn to have been made by Mrs. Wakefield, from some or any part of the money of her husband's estate, used by her in the brick business, the plaintiffs are entitled to a ninth share of the excess as part of the capital.

I think the judgment should be varied in accordance with these conclusions.

Moss, J.A.:—The judgment issued pursuant to the views held by the Chancellor and Robertson, J., is more favourable to the appellant than would be a judgment in accordance with the views of Meredith, J. The respondents, while not abandoning their right to insist in argument that they are entitled to a judgment on the footing of Meredith, J.'s, opinion, express their willingness to remain content with the judgment issued.

The question on this appeal is therefore whether the judgment of MacMahon, J., ought to be restored, and I am of opinion that it ought not.

At the time of his death the testator, William Wakefield, was carrying on the business of a brick and tile maker upon certain leasehold premises, from a portion of which he was entitled to take clay for use in the manufacture of his stock-in-trade. He was also possessed of certain horses, implements, and other articles forming the plant used in the business.

There was no specific bequest of the plant or ordinary chattels. There was a general bequest and devise of all the testator's property to his wife, to be used and enjoyed by her for and during her life or widowhood, and after her decease or marriage to certain of his children, share and share alike. There was no direction to continue the business or any other express provision pointing to that as the only method of use and enjoyment intended by the testator. The will contained nothing to indicate, as in *Groves v. Wright*, 2 K. & J. 347, that these articles were not to be sold until after the termination of the estate for life. An obvious means by which the widow

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would obtain the use and enjoyment of the perishable articles and the leaseholds, and probably the fairest way to those entitled in remainder, was to sell and invest the proceeds. And probably if she had been a trustee only, she would have been advised that her duty was to sell. See *Tickner v. Old* (1874), L.R. 18 Eq. 422; *Macdonald v. Irvine*, 8 Ch. D. 101.

But she deemed this course not so desirable in her own interest as a retention of the property in specie. It followed that in order that it might bear income it had to be employed in business, and the widow accordingly elected to continue the testator's business, and to embark therein the moneys and proceeds of stock-in-trade and other business assets left by the testator. As executrix and tenant for life of the testator's estate, she occupied a dual position. While she was entitled to the use and enjoyment of the estate during life or widowhood, she was also a trustee for those entitled in remainder.

Continuing the trade and employing in it the property in which the remaindermen were interested, it was as much her duty to preserve their beneficial interest in the property as it was to render it profitable to herself. The rule, *quæ ipso usu consumuntur*, did not apply to it. See on this point the recent case of *Myers v. Washbrook*, [1901] 1 Q.B. 360. And the acts of procuring new leases of the premises are properly to be regarded as done by her as much in performance of her duty as trustee as for the enhancement of her own position, and so with regard to the replacement of plant called for in the progress of time and the expansion of the business.

She drew out of the avails of the business for her own purposes as much as she thought fit either for support or for use or investment in other ways not connected with the continued business or the use or employment of the estate therein. For fair drawings or her manner of using them she was not bound to account to the remaindermen. But within fair bounds it rested with her to measure the extent of her drawings. She was at liberty to leave undrawn such portions as seemed in her judgment unnecessary for her private purposes. And it is perfectly fair to assume that she intended that what she left undrawn should remain for the benefit of those in remainder. Under the will she was the judge as to what she might con-

sider sufficient use and enjoyment of the estate, and therefore all she thus left undrawn is to be deemed the estate relinquished by her and left in the exercise of her judgment to be taken by those claiming in remainder under the will.

LISTER, J.A. :—I agree.

Appeal dismissed.

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[IN THE COURT OF APPEAL.]

LEGGO V. WELLAND VALE MANUFACTURING COMPANY.

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Bailment—Fire—Damages—Sale of Goods.

The defendants agreed to make for the plaintiff certain tools used in manufacturing hubs of a special kind, and, in consideration of being allowed to use the tools, to manufacture also a number of the hubs :

Held, that the use of the tools was an unconditional appropriation thereof to the contract, so that the property in them had passed to the plaintiff; that while using them the defendants were bailees thereof for hire, and after ceasing to use them, gratuitous bailees; that the defendants having neglected to send the tools to the plaintiff after repeated requests were liable to him in damages; but that these damages were nominal only, and that the plaintiff could not, upon the destruction of the tools by an accidental fire while retained by the defendants, recover from them their value, that destruction not being damage such as might fairly and reasonably be considered as arising from the breach, or in contemplation of the parties.

Judgment of MacMahon, J., affirmed.

AN appeal by the plaintiff from the judgment at the trial was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, and MOSS, JJ.A., on the 17th of January, 1901.

The action was brought to recover the value of certain tools destroyed by fire while in the possession of the defendants, under the circumstances set out in the judgment.

E. E. A. DuVernet, and *Courtney Kingstone*, for the appellant.

Lynch Staunton, Q.C., and *A. W. Marquis*, for the respondents.

May 14. ARMOUR, C.J.O. :—The contract between the plaintiff and defendants is contained in the following letter written by the defendants to the plaintiff and accepted by him :—

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" June 1st, 1899.

We hereby agree to make all the tools required to manufacture the special hub as per sample shewn, and as per cost furnished, for the sum of six hundred and sixty dollars (\$660) cash.

It is agreed that the above named sum of \$660 shall be paid to us within one week from this date, otherwise this offer shall be of no effect and shall be considered as never made.

When the tools above named shall be completed, we will notify you of the completion of the same, and it is agreed that you will, within one week from said notification, send us thirteen hundred and fifty dollars (\$1,350) to pay for 500 hubs at the price of \$2.70 each, at which price we agree to make the 500 hubs referred to.

If the sum referred to, namely, \$1,350, is not paid at the time mentioned, we reserve the right to refuse the order for the hubs, and the tools will be held subject to your order; time is of the essence of this agreement."

On the 10th July, 1899, the defendants wrote to the plaintiff as follows: "We are sending you by this mail a complete list of the tools which we are making for you. We beg to inform you that the tools will be completed on the 12th inst., and we could then make to advantage some of the parts of the hubs at once. If you would kindly let us have the amount for the hubs according to the contract, we will begin to make the hubs for you at once."

And on the 22nd July, 1899, the plaintiff paid to the defendants the agreed sum of \$1,350.

On the 4th January, 1900, the defendants wrote to the plaintiff: "We would advise that your hubs are all ready and are here to your order and risk. We would be pleased to receive shipping instructions from you regarding the same and await your early reply."

On the 11th January, 1900, the plaintiff wrote to the defendants: "Replying to your favour of the 4th inst., I request that you will ship the entire balance of the brake hubs made for me, and also the entire outfit of tools appertaining to the manufacture of said hubs, to Mr. Alexander Murray at Massi-
wippi, P.Q., Canada. This is a station on the Boston and Maine

R.R., between Elenport, Vt., and Sherbrooke, P.Q. Please pack very carefully and ship by freight."

On the 11th January, 1900, the defendants wrote to the plaintiff: "Some time ago we sent you back the die for stamping the hubs. We find that we have 11 hubs to finish yet, so kindly send us the die by return mail and oblige."

On the 13th January, 1900, the plaintiff wrote to the defendants: "By this mail I return the die recently received from you. When done with it, please send the die to Mr. Murray in case with other tools instead of here, if convenient, and oblige."

On the 15th January, 1900, the defendants wrote to the plaintiff: "We are in receipt of your favour of the 11th inst., and will make shipment of the brake hubs as requested."

[The learned Chief Justice then referred to some further correspondence between the parties, containing frequent requests by the plaintiff for the tools, but chiefly in connection with certain questions, not necessary to be stated here, which arose between them, ending with a letter written on the 12th of May, 1900, to the plaintiff by the defendants, in which the latter said]: "We enclose you invoices receipted. We will have the tools packed and sent to you. There are a few extra pieces that we will send along with the tools."

The 12th May, 1900, was a Saturday—J. D. Chaplin, the person who wrote the letter of that date, and who gave the orders for the packing of the tools, was not called as a witness—but the orders to pack the goods were not given till Tuesday, the 15th May, nor were they packed until the afternoon of that day, when they were left at the door of the paint shop addressed and ready for shipment, and on Wednesday morning they were destroyed by an accidental fire.

The plaintiff thereupon brought this action, basing his right to recover on the allegation of the agreement of the 1st June, 1899—the payment of the \$660 therein mentioned—that "the defendants completed the said tools some time prior to the 22nd March, 1900, and the plaintiff requested them to ship the same, and subsequently made frequent similar requests, but the defendants failed to deliver the said tools, and that in the alternative that the said tools were let by the plaintiff to the defendants

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for the purpose of enabling the defendants to manufacture the said hubs, and that in consideration thereof they expressly undertook to deliver the said tools to the plaintiff's order; that the plaintiff frequently directed the said goods to be delivered, but the defendants in breach of their undertaking improperly neglected and refused to deliver the said tools."

The cause was tried by MacMahon, J., on October 23rd, 1900, who dismissed the action without costs.

The rule is that where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and such assent may be express or implied, and may be given either before or after the appropriation is made.

In this case the tools to be made by the defendants, and for which they were paid \$660 in cash, were all the tools required to manufacture the special hubs as per sample shewn and as per cost furnished.

When the tools should be completed, the defendants were to notify the plaintiff of such completion, which they accordingly did, and it was agreed that if within one week from such notification the plaintiff should pay to the defendants \$1,350, being the sum of \$2.70 each for 500 hubs, the defendants would make the 500 hubs for the plaintiff.

The plaintiff, after receiving such notification, paid to the defendants the agreed sum of \$1,350, and the defendants proceeded and with the said tools made the said hubs as agreed.

The use of the said tools by the defendants in making the said hubs for the plaintiff at his request, was an unconditional appropriation to the contract of the said tools by the mutual assent of both the plaintiff and the defendants, and the property in the tools thereupon passed to the plaintiff.

The case of *Shaw v. Smith* (1880), 48 Conn. 306, was much relied on by counsel for the plaintiff, but that case is quite distinguishable from this, for in that case the tools for making the machine heads were never completed.

While the tools were being used by the defendants in making the hubs, the defendants were, in my opinion, borrowers of the tools for hire, for the use of the tools was obviously part of the consideration given to the defendants by the plaintiff for making the hubs.

But when the hubs were made, the hiring of the tools ceased and the defendants thereafter became at most the mere gratuitous bailees of the tools, for they were not obliged by their contract to deliver the tools except at their factory when called for; and, as gratuitous bailees, would only be responsible for gross negligence and would not be responsible for the destruction of them by an accidental fire.

The defendants, however, being such gratuitous bailees of the tools, agreed with the plaintiff that, in consideration of the sum of \$6.50 paid to them, they would have the tools packed and sent to him.

If a reasonable time had not elapsed to enable the defendants to perform this contract there was no breach of it, but if a reasonable time had elapsed to enable them to perform it before the tools were destroyed by fire—and I am of the opinion, having regard to the repeated requests made by the plaintiff to the defendants to pack and send the tools, and to the other circumstances of this case, that a reasonable time had elapsed—then there was a breach of it, and the question arises what damages the plaintiff is entitled to recover from the defendants for such breach.

And I am of the opinion that he is at most entitled to nominal damages, for the destruction of the tools by fire was not a damage such as might fairly and reasonably be considered as either arising naturally according to the usual course of things from the breach of such contract, or such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

In case the plaintiff should be held to be entitled to nominal damages, he would fare no better as to costs than he has fared, and I think therefore that the appeal should be dismissed without costs.

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OSLER, J.A. :—I think that on the evidence it is made out that there had been a delivery to and acceptance of the articles in question within the terms of the contract, and that the property therein had passed to the plaintiff. The sole question which then remained was whether there had been any breach of the subsequent contract between the parties by which the defendants were to put the articles on their way for transmission to the place where the plaintiff desired them to be sent. The articles were at this time in the defendants' establishment at the plaintiff's risk. They assumed the duty of delivering them to the Grand Trunk Railway Company at St. Catherines to be shipped from that station to the address given by the plaintiff. Before the railway delivery waggon called for them the defendants' premises were destroyed by fire and the plaintiff's property, then packed up and awaiting the call of the railway servants, was lost. The defendants were gratuitous bailees of this property, and if they had sent it away before the fire the plaintiff would probably have suffered no loss. The fire was not an event to be anticipated or against which unusual expedition or special precautions were called for. Apart from the question what should be the proper measure of the plaintiff's damage if he were held entitled to recover, and my impression is that it would be found that damages would be nominal only, the case comes down to this, viz., whether the defendants were guilty of unreasonable delay in carrying out their agreement to send forward the plaintiff's goods. Taking all the circumstances into consideration, I cannot differ from the decision of the learned trial Judge on this point, and would therefore dismiss the appeal.

I think it should be without costs.

MACLENNAN, J.A. :—I am of opinion that we ought not to interfere with the judgment in this case.

The contract of the defendants was to manufacture the tools, and it is wholly silent as to the mode or place of delivery. Payment was to be, and was in fact made, in advance; and it appears from the evidence and the terms of the contract, taken together, that the defendants were, when the tools were made, to manufacture for the plaintiff 500 hubs of the special kind

for the making of which the tools were specially adapted. After the tools were made, the hubs were also manufactured, and were received by the plaintiff, having been also paid for in advance. The tools remained in the possession of the defendants at their factory. They had, however, been seen by the plaintiff, but he had not made any close or minute examination of them. He had expressed his satisfaction with the hubs in a letter of the 23rd of April; and on the 26th of April, in a letter of that date, he said that when the tools had been shewn to him at the factory, he found them in very nice order indeed, and asked that they should be so delivered. On the 28th of April the defendants wrote to the plaintiff that they held the tools subject to his order and would hand them to any one he named, but would not go to any expense on his account unless repaid for the same. This referred to the expense of boxes, which would be required for packing them for shipment. Upon this the plaintiff agreed to pay for the boxes, and to return a hub about which a dispute had arisen between them. On the 7th May the defendants wrote to the plaintiff that on receipt of \$6.50 they would box and pack the tools and send them forward. On the 11th May the plaintiff remitted the \$6.50, the receipt of which was acknowledged on the 12th by letter, in which the defendants say that they will have the tools packed and sent forward. The tools were packed ready for shipment, but before they were sent away they were burned in an accidental fire in the defendants' factory.

This action was commenced on the 20th of June for the return of the sum of \$660 paid for the tools with interest, and for damages for non-delivery.

The statement of claim, after setting out the contract for the manufacture of both the tools and the hubs, alleges, paragraph 4, that the defendants completed the said tools some time prior to the 22nd March, and that the plaintiff requested the defendants to ship the same, but the defendants failed to deliver them. It also alleges, paragraph 5, in the alternative, that the tools were let by the plaintiff to the defendants for the purpose of enabling the defendants to manufacture the hubs, and that in consideration thereof they expressly undertook to deliver them to the plaintiff.

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Now, upon these facts, and the case made by the pleading, I think it is quite out of the question to contend, as the plaintiff's counsel contended before us, that the property in the tools had never passed, and that the risk, at the time of the fire, was with the defendants. I think it clear that the proper conclusion is that at the time of the fire the tools were the property of the plaintiff, and that the only question which can arise is whether the defendants had contracted to pack and ship them to the plaintiff, and if so, whether there was any breach of that contract by the defendants in not shipping them before they were destroyed by fire.

I think there was such a contract, manifested by the letters of the 7th, 11th, and 12th of May; and the further question is whether there was unreasonable delay in packing and shipping, on the part of the defendants. The learned Judge has decided that there was no such delay, and I do not think that he was wrong in his conclusion. The plaintiff's letter, enclosing the necessary expenses, was received at about noon on Saturday, the 12th of May, which was a half-holiday at the factory. The fire occurred before daylight on the morning of the following Wednesday. The delay, therefore, was two whole days. During that time the tools had been boxed and got ready for shipment. I cannot say that was an unreasonable delay, having regard to all the circumstances.

I think the case must be regarded as if there had been no fire. If the tools had been shipped on the Wednesday, no one could say there was unreasonable delay. The plaintiff's letters do not ask for haste in shipment, or state any reason for urgency, and the possibility of loss or damage by fire was not in the contemplation of the parties.

But even if it could be said that there was unreasonable delay, I do not think there was any damage proved which could properly be recovered as legally flowing from the breach of the contract: *Hadley v. Baxendale* (1854), 9 Exch. 341, and numerous cases in which it has been followed, the latest of which appears to be *Agius v. Great Western Colliery Co.*, [1899] 1 Q.B. 413.

I think the appeal should be dismissed.

Moss, J.A. :—I agree.

Appeal dismissed.

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[IN THE COURT OF APPEAL.]

BROWN V. LONDON STREET RAILWAY.

C. A.

1901

May 14.

Negligence—Contributory Negligence—Jury—Trial—Form of Questions.

When contributory negligence is set up in an action to recover damages for negligence, which is being tried before a jury, the plaintiff is entitled to a clear and distinct finding upon the point.

In an action against a street railway company to recover damages, the jury, after finding in answer to questions that the defendants were guilty of negligence, in running at too high a rate of speed, not properly sounding the gong, and not having the car under proper control, and that the plaintiff's injury was caused by this negligence, said in answer to further questions, that the plaintiff was guilty of contributory negligence in not using more caution in crossing the railway tracks :—

Held, that this answer was ambiguous and unsatisfactory, and, in view of the previous distinct answers, not fairly to be treated as a finding of contributory negligence.

Per OSLER, J.A. Instead of putting in such cases the question, "Was the plaintiff guilty of contributory negligence?" involving, as it does, both the fact and the law, it would be better to ask, "Could the plaintiff by the exercise of reasonable care have avoided the injury?" and to provide for the case of an affirmative answer by the further question, "If so, in what respect do you think the plaintiff omitted to take reasonable care?"

Judgment of Meredith, C.J., reversed.

APPEAL by the plaintiff from the judgment at the trial.

The plaintiff sued to recover damages for personal injury sustained by him, caused, as he alleged, by the negligence of the motorman who was operating one of the defendants' electric motor cars.

The tracks of the defendants' railway were, at the time the plaintiff received his injury, laid on Dundas Street in the city of London. This street extends in an easterly and westerly direction and is intersected by Colborne Street, which extends in a northerly and southerly direction. The accident occurred between five and six o'clock on the 20th of July, 1899. The plaintiff had walked south along the east side of Colborne Street, and when he reached the north-east corner of Colborne and Dundas streets, owing to repairs that were being done to the cross-walk, he proceeded to cross to the south-west corner

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of the same streets in a diagonal direction, and, just as he was stepping over the north rail of the north track of the defendant's railway, he was struck by one of their cars going west, and was very seriously injured.

The plaintiff, in giving his evidence, stated that when he reached Dundas street, and before he started to cross, he stepped out beyond the kerb and looked to the east to see if there was a car coming, and not seeing one he then proceeded to cross the street in the way before described. He admitted that he did not again look to the east for an approaching car, and he said he neither saw nor heard the car coming.

The action was tried before Meredith, C.J., and a jury.

Six questions were given to the jury to answer, which, with the answers thereto, were as follows:

1. Were the defendants guilty of negligence? A. Yes.
2. If so, in what did the negligence consist? A. Running at too high a rate of speed and not properly sounding the gong, also not having the car under proper control.
3. If the defendants were negligent, was the injury to the plaintiff caused by their negligence? A. Yes.
4. Was the plaintiff guilty of contributory negligence? A. Yes.
5. If so, in what does the negligence consist? A. In not using more caution in crossing the railway tracks.
6. Might the defendants' servants, after the position of the plaintiff became apparent, by the exercise of reasonable care, have prevented the accident? A. No.
7. At what sum do you assess the plaintiff's damages? A. Six hundred dollars.

The learned Chief Justice, construing the answers to the fourth and fifth questions as a finding by the jury of contributory negligence by the plaintiff, directed judgment to be entered for the defendants dismissing the action.

The appeal was argued before OSLER, MOSS, and LISTER, JJ.A., on the 29th of January, 1901.

Gibbons, K.C., for the appellant.

I. F. Hellmuth, for the respondents.

May 14. OSLER, J.A.:—The answers of the jury to the first three questions put to them by the learned trial Judge are clear and plain. Read consecutively they say in express terms that the defendants were guilty of negligence in running their car at too high a rate of speed and in not properly sounding the gong, and in not having their car under proper control, and that the injury to the plaintiff was caused by their negligence. Conclusive, one would say, against the defendants.

Then three further questions were put to which the jury answer (again reading the answers consecutively) that the plaintiff was guilty of contributory negligence in not using more caution in crossing the railway track, and that the defendants' servants, after the position of the plaintiff became apparent, could not by the exercise of reasonable care have prevented the accident.

I do not understand how the last part of their answer is consistent with the last part of the answer to the first set of questions, namely, that the injury to the plaintiff was caused by the acts of negligence of which the defendants were found guilty, for if the defendants could not in the result have avoided the accident then the accident was not caused by their negligence, and the third question ought to have been so answered, although, framed as the questions are, I doubt whether the jury could readily have understood this. I do not think that they meant to say that the injury happened by means or in consequence of the joint negligence of the plaintiff and defendants, nor am I prepared to say that when they answer that the contributory negligence of the plaintiff consisted in his not using more caution in crossing the track they meant to say that he was not using ordinary or reasonable or proper care having regard to what he knew, or ought to have known, of the negligent manner in which the defendants were running the car. Although the question is sometimes put as it was put here, viz., "Was the plaintiff guilty of contributory negligence?" I think, with deference, that is apt to mislead, involving, as it does, both the fact and the law. It seems to me better to ask whether the plaintiff could by the exercise of reasonable care have avoided the injury, and to provide for the case of an affirmative answer by the further question, if it is

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thought worth while to do so: "In what respect do you think the plaintiff was negligent [or omitted to take reasonable care]?"

Then would follow the questions whether notwithstanding the want of reasonable care on the plaintiff's part the defendants could by reasonable care on their own part have avoided the accident.

I repeat that the express finding of the jury that the plaintiff's injury was caused by the specific acts of negligence of which the defendants were guilty makes it, to my mind, almost impossible to attribute to their further finding that the plaintiff should have used more caution in crossing the track, the legal result of a finding of contributory negligence.

As the Chief Justice of the Supreme Court said in *Rowan v. Toronto Railway Co.* (1899), 29 S.C.R. 717, 719, where the first three questions were the same and answered in the same way as in this case: "In order to disentitle (the plaintiff) to recover, it must be found distinctly that the accident was attributable to his failure in the duty imposed upon him of taking proper care to avoid the accident."

If the jury had not found that the defendants' negligence caused the accident it may well be that a finding that the plaintiff ought to have used "more caution," when read in conjunction with the next answer, would be equivalent to a finding that the plaintiff's negligence was the efficient, or an efficient, cause or proximate cause of his injury. But in the face of the third finding I think we cannot so hold.

I am, therefore, on the whole in favour of granting a new trial. Costs to abide the result.

Moss, J.A.:—I agree.

LISTER, J.A.:—The evidence at the trial, on the question of the defendants' negligence, was conflicting, but, in view of the jury's answers to the first three questions submitted to them, the negligence of the defendants and its causal relation to the plaintiff's injury must be assumed to be established.

The substantial question which this appeal presents is as to the construction to be put upon the jury's answers in respect of the plaintiff's alleged contributory negligence. The plaintiff

cannot recover if his own want of ordinary or common care or caution proximately contributed to his injury, but must accept the consequences of his own recklessness. Whether he was guilty of such negligence was a question for the consideration of the jury upon the evidence. The jury found that the plaintiff contributed to the accident in not using more caution in crossing the railway tracks, and we are asked to construe this as a finding that the plaintiff when the accident occurred was in the exercise of less than ordinary care and caution but for which the accident would have been avoided.

The finding is confused and unsatisfactory. How can it be seen that the jury did not mean to find that the plaintiff in not using extraordinary care and caution contributed to the accident. We might perhaps conjecture that the jury intended to say that the plaintiff was negligent in not looking for an approaching car before attempting to cross the tracks, but they have not said so, and, having regard to their unambiguous findings that the defendants were guilty of negligence in running their car at too high a rate of speed, in not properly sounding the gong, and in not having the car under proper control, and that the plaintiff's injury was caused by such negligence, it is difficult to conclude from their finding as to the contributory negligence that they intended to say that the plaintiff could have avoided the accident by the exercise of ordinary care and caution.

The plaintiff is entitled to a clear and distinct finding on the question of his own negligence. The finding does not clearly express the intention of the jury and, therefore, I think there should be a new trial.

See *Rowan v. Toronto Railway Co.*, 29 S.C.R. 717.

Appeal allowed.

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[IN THE COURT OF APPEAL.]

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May 14.

MITCHELL V. CITY OF HAMILTON.

** Street Railway—Highway—Removal of Snow.*

By the provisions of a municipal by-law, to which a street railway company were bound to conform, the company were obliged to remove snow from their tracks in such manner as not to obstruct or render unsafe the free passage of sleighs or other vehicles along or across the street. After a heavy snow-fall the company removed the snow from their tracks, the result being that there was a bank of several inches at each side of the tracks to the level of the snow-covered portions of the street :—

Held, that the company had not discharged their obligation and that they were liable to indemnify the city against damages recovered against the city by a person who had in consequence of the bank been upset while driving along the street.

Judgment of Rose, J., affirmed.

AN appeal by the third parties, the Hamilton Street Railway Company, from the judgment of Rose, J. in favour of the plaintiff in an action against the city for damages, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 18th and 19th of March, 1901. The by-law upon the meaning of which the case depends, is set out in the judgments.

P. D. Crerar, and *W. W. Osborne*, for the appellants.

MacKelcan, K.C., and *J. L. Counsell*, for the respondents.

May 14. OSLER, J.A.:—In this action the plaintiff sought to recover damages for injuries sustained by him in consequence of the defendants' neglect to keep one of the streets of their municipality in repair. The negligence alleged and proved was in permitting large quantities of snow and ice to accumulate on the south side of the street adjoining the tracks of the Street Railway Company in such a manner as to form a dangerous bank with a steep descent towards the street railway tracks which occupied the middle of the street. The plaintiff's sleigh, while being driven along the south side of the street, slipped down the bank on to the tracks and the plaintiff was thrown out and injured. The defendants brought the Street Railway Company into the action as third parties, claiming indemnity under the provisions of the city by-law, by the authority of which

they were permitted to operate their railway, and on other grounds.

The company appeared at the trial and resisted the plaintiff's claim, and also the defendants' claim for indemnity, but the plaintiff had a verdict which has not been moved against, and judgment was also given in favour of the defendants against the company for the relief over claimed by them. Against this judgment the present appeal was brought.

The case is not unlike that of *Toronto Railway Co. v. City of Toronto* (1895), 24 S.C.R. 589, where the railway company was held liable to indemnify the city against damages which they had been compelled to pay to one Langstaff in consequence of an injury sustained by him under circumstances similar to those which were proved in the present case.

The appellants deny that the road was in the dangerous condition asserted by the plaintiff. They say that they removed the snow as required by the city by-law from the space occupied by the rails and for a distance of two feet on each side, but not in such a manner as to leave the travelled snow road in a dangerous condition and that, having complied with the terms of the by-law, they were under no obligation to indemnify the defendants.

I think that the appeal cannot succeed. The condition in which the road was left was a question of fact. And there was evidence that whether the company had or had not removed from the road at the side of their tracks all the snow which they had thrown out thereon, there was a steep descent of from a foot to eighteen inches from the side of the road close to the tracks, caused by the removal of the snow from the tracks, which, but for the act of the company in removing it as thoroughly as they had done, would practically have filled up the depression, or would have left it in a condition not dangerous to travellers. The appellants say that they had in fact removed from the side of the road all the snow they had thrown out from the part occupied by their tracks, so that the latter formed no part of the elevation or bank at the side, but I do not think that this would be sufficient to exonerate them. For their own purposes it seems to have been necessary, or at least convenient, that all, or nearly all, the snow should be

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removed from the middle of the street, and that to prevent the rails from being blocked it should also be removed for some distance on the outside of the tracks.

But it is provided by sec. 17 of city by-law 624, under the authority and subject to the conditions of which the company operate their road, that "whenever it shall be necessary to remove any snow or ice from the track or tracks of the company's road, switches, or turnouts, and from the spaces between such tracks, and for two feet outside of such tracks, or wherever the city engineer or other officer having charge of the streets shall direct the removal thereof, such snow and ice shall be removed by the company in such manner as not to obstruct or render unsafe the free passage of sleighs or other vehicles along or across the street, and all snow and ice removed from the track or tracks of the company or from the spaces between or alongside such tracks shall be forthwith carried away by and at the expense of the company to some other street or suitable place. . . . and in removing snow or ice from their tracks the company shall leave the surface of the snow between their tracks as much above their rails as it can be allowed to remain without impeding the operations of the railway." It is manifest that under the terms of this by-law the company are not at liberty in removing the snow from that portion of the street from which they are permitted to remove it, to do so in such a manner as to make travel on other parts of the street dangerous. If the snow-fall is so great that by clearing the tracks and removing the snow therefrom altogether a dangerous declivity towards them would be caused, the company are bound to avoid that result, either by not removing so much snow from the tracks or by reducing the accumulation at the side to a reasonable depth.

That appears to me to be their obligation under the by-law. They must not cause the road to become dangerous by the manner in which they remove the snow from the tracks. If they do, and the city is obliged in consequence thereof to pay damages, the other provisions of the by-law, and the covenant entered into by the company pursuant thereto, cast upon them the duty and liability of indemnifying the city.

The appeal must therefore be dismissed.

MACLENNAN, J.A. :—The appeal depends on the construction of sec. 17 of city by-law number 624, to which the company is under obligation to conform.

That section, as far as material, is as follows:—

“(17) Whenever it shall be necessary to remove any snow or ice from the track or tracks of the said company’s road, switches, or turnouts, and from the spaces between such tracks, and for two feet outside of such tracks, or wherever the city engineer, street commissioner, or other officer having charge of the streets, shall direct the removal thereof, such snow and ice shall be removed by the company in such manner as not to obstruct or render unsafe the free passage of sleighs or other vehicles along or across the street, and all snow and ice removed from the track or tracks of the company or from the spaces between or alongside such tracks shall be forthwith carried away in sleighs or other vehicles by and at the expense of the company, to some other street or suitable place, to be approved by the city engineer, etc.”

The contention of the railway company is that they removed all the snow found upon their tracks, etc., and carried it all away to other suitable places, just as the by-law required, and that having done so, and not having deposited any of the snow so removed upon the adjacent parts of the street, they had no further duty and no further responsibility for the condition of the street. It may be conceded that the company proved that they did carry away all the snow which they removed from the tracks, and left none of it on other parts of the street; but that was not their whole duty and obligation under the by-law. It further requires that it shall be removed in such a manner as not to obstruct or render unsafe the free passage of sleighs, or other vehicles, along or across the street. It is not merely that they are to take care that the snow and ice removed shall not obstruct or render unsafe passage along the street. That is to be secured by carrying the snow and ice away to some other place. But it is the manner of removal which is not to obstruct, etc., and by manner I mean the condition of the street resulting from the removal. The removal done by the company left the street in a dangerous condition, because there had been a very great fall of snow; and when the com-

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pany had removed it from their tracks the result was a deep channel in the middle of the street, with dangerously high banks on each side for a roadway. The plaintiff's sleigh slipped down from that roadway into the channel, with the result of the injury complained of.

I think the appeal should be dismissed.

ARMOUR, C.J.O., MOSS, and LISTER, J.J.A., concurred.

Appeal dismissed.

R. S. C.

[IN THE COURT OF APPEAL.]

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 May 22.

MARSHALL V. INDUSTRIAL EXHIBITION ASSOCIATION OF
 TORONTO.

Negligence—License—Invitation.

AN appeal by the defendants from the judgment of a Divisional Court, reported 1 O.L.R. 319, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 21st and 22nd of May, 1901, and at the conclusion of the argument was dismissed with costs, the Court agreeing with the judgment below.

Wallace Nesbitt, K.C., and *G. L. Smith*, for the appellants.
Lindsey, K.C., and *W. R. Wadsworth*, for the respondents.

R. S. C.

[IN THE COURT OF APPEAL.]

ROBINSON V. MANN.

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May 14.

Chattel Mortgage—Endorsement of Note—Bills of Exchange and Promissory Notes.

While the endorsing by a person, not a party to a note, of his name upon it before it has been endorsed by the payee is not an endorsement in the legal sense so as to make that person legally liable to the payee, a chattel mortgage to the intending endorser to secure him against the liability intended to be incurred cannot be set aside by the mortgagor's assignee for creditors after the mortgagee has paid the note in question.
Judgment of Meredith, J., affirmed.

AN appeal by the plaintiff from the judgment at the trial was argued before ARMOUR, C.J.O., OSLER, and MOSS, JJ.A., on the 30th of January, 1901. The facts are stated in the judgments.

E. B. Ryckman, and *A. T. Kirkpatrick*, for the appellant.
I. F. Hellmuth, for the respondent.

May 14. ARMOUR, C.J.O.:—This action was brought by the plaintiff as assignee under R.S.O. 1897 ch. 147 of one Walter Mann against one George T. Mann to set aside as fraudulent and void against creditors a certain chattel mortgage, bearing date the 25th day of September, 1899, given by the said Walter Mann to the said George T. Mann, whereby, after reciting that the said mortgagee had endorsed a certain promissory note of the said mortgagor for the sum of twelve hundred dollars for the accommodation of the said mortgagor, which said note was in the words and figures following:

\$1,200.

London, Sept. 25th, 1899.

Three months after date I promise to pay to the order of the Molson's Bank here twelve hundred dollars for value received.

(Sgd.) W. Mann & Co.

(Sgd.) on back, Geo. T. Mann.

And after reciting that the said mortgagor had agreed to enter into those presents for the purpose of indemnifying and saving harmless the said mortgagee of and from the payment of the said note or any part thereof, or any note thereafter to

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be endorsed by the said mortgagee for the accommodation of the said mortgagor by way of renewal of the said recited note, so that, however, said renewal should not extend the time of payment of said note beyond the period of one year from the date thereof nor increase the amount of said liability beyond the amount of the principal money secured by the said note together with interest accruing thereon, together with indemnification against loss, charges, damages and expenses as thereafter provided, the said Walter Mann granted, bargained, sold and assigned the property therein mentioned to the said George T. Mann with a proviso therein contained for making the same void if the said mortgagor, his executors and administrators did and should well and truly pay, or cause to be paid, the said note as aforesaid endorsed by the said mortgagee, a copy of which said note was set out in the recital thereof, and did and should well and truly pay or cause to be paid any note or notes which might thereafter be endorsed by the said mortgagee for the accommodation of the said mortgagor by way of renewal of the said note as in the recital set forth, etc.

This chattel mortgage was accompanied by an affidavit of execution and by an affidavit of George Thomas Mann, the mortgagee, that he endorsed the promissory note in the said mortgage mentioned, and that the said mortgage was executed in good faith and for the express purpose of securing payment of the said note or any renewals thereof, and as security and indemnity to him against the said endorsement and any loss thereby, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of Walter Mann, the mortgagor therein named, nor preventing such creditors of Walter Mann from obtaining payment of any claim which they might have against the said mortgagor, Walter Mann, and was duly filed.

The promissory note mentioned in the said chattel mortgage was discounted at the Molson's Bank by Walter Mann, who got the proceeds thereof, and fell due on the 28th day of December, 1899, and was protested for non-payment and due notice of dishonour thereof was given to the said George T. Mann, who, on the 4th day of January, 1900, paid the sum to the Molson's

Bank; and on the 19th day of January, 1900, the said Walter T. Mann assigned.

The cause was tried by Meredith, J., at London, on the 19th of November, 1900, who dismissed the action with costs.

I see no reason to differ from the finding of the learned trial Judge that the impeached transaction was an honest one and did not offend either against 13 Eliz. ch. 5 or R.S.O. 1897 ch. 147.

What was chiefly pressed upon us in argument was that the defendant was never liable upon the promissory note, to secure him against the endorsement of which the chattel mortgage was made, and consequently that the chattel mortgage was void, there being no consideration for it, and *Jenkins v. Coomber*, [1898] 2 Q.B. 168; *Canadian Bank of Commerce v. Perram* (1899), 31 O.R. 116; and *Small v. Henderson* (1899) 27 A.R. 492 were cited in support of this contention. Doubtless the Molson's Bank could not have recovered the amount of this note against the defendant in the form in which it was, and endorsed as it was by the defendant, the Molson's Bank never having endorsed it; but this does not prove that the defendant incurred no liability by his endorsement of it, for the circumstances under which it was made and endorsed and discounted shew clearly that the Molson's Bank would have been entitled to have had it expressed according to the intention of the parties, and the mistake consisted of making them the payees instead of the defendant: *Watkins v. Maule* (1820), 2 Jac. & W. 237; 15 Am. & Engl. Encycl. 1st ed., p. 669.

The appeal must, therefore, be dismissed with costs.

OSLER, J.A.:—The plaintiff sues as assignee under the Assignments and Preferences Act, sec. 9 (2), to declare fraudulent and void as against creditors a chattel mortgage given by the assignor, Walter Mann, to the defendant to indemnify him against the payment of a promissory note for \$1,200 made by the assignor and endorsed by the defendant at his request and for his accommodation. The note was discounted by the Molson's Bank for the assignor, who received the proceeds and applied them towards payment of his debts. The defendant

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afterwards, on the default of the maker and before the assignment, paid the note to the holders.

All charges of fraud and fraudulent preference were clearly disproved, but the plaintiff contends that, owing to the form of the transaction, the defendant never was under any legal liability to the bank to pay the note; that the payment was, therefore, voluntary and in his own wrong, and the obligation of the assignor to indemnify him never arose by virtue of the mortgage which is, consequently, a void and ineffective instrument under the provisions of the Bills of Sale and Chattel Mortgage Act.

It was proved that the assignor had requested the defendant to endorse his note in order to enable him to raise money by discounting it with a bank, and that the defendant agreed to do so upon receiving the security in question. A note was, accordingly, prepared, made by the assignor and payable to the Molson's Bank. The defendant endorsed it and gave it to the maker, who then procured it to be discounted by the bank. The bank never endorsed it and there was no communication between the defendant and the bank on the subject until it became due and was protested, a few days after which the defendant paid it.

The mortgage, which bears even date with the note, recites that the mortgagee had endorsed the note—setting it forth at length—for the accommodation of the mortgagor, and that the latter has agreed to give the mortgage for the purpose of indemnifying and saving harmless the mortgagee from the payment thereof, or any part thereof, and the mortgagor covenants with the mortgagee to pay the note and to indemnify and save harmless the mortgagee from all loss, costs, charges and expenses in respect thereof.

If the defendant's right to succeed in this action depended upon his being able to shew that the Molson's Bank could, in some way, have enforced payment by him of the promissory note, if he had determined to resist their demand and to repudiate the agreement which he had made with his brother, and which he supposed he had carried out by endorsing the note in question in the way in which he did endorse it, his task would, in my opinion, not be an easy one. The case is very

different from *Watkins v. Maule*, 2 Jac. & W. 237. There the note was payable to order, and was transferred by the payee for valuable consideration to the plaintiff's testator. He had, however, omitted to endorse it, and many years afterwards his administrator did so in order to perfect the title of the holders and enable them to recover against the maker. It was held that this could be legally done as the payee could have been compelled in equity to complete the holders' title by endorsing the note.

Here the bank dealt with the maker of the note alone, and took an instrument which he could not have compelled the defendant to exchange for one in different form. Between the bank and the defendant there was no privity. He had made no representation to them, and they were in no better position to compel him to give them a different endorsement than their customer was: *Edge v. Bumford* (1862), 31 Beav. 247.

The case is more like that of *Harvey v. Bank of Hamilton* (1888), 16 S.C.R. 714, from which, however, the absence of any direct dealing between the defendant and the bank also distinguishes it. There, the defendant and others, directors of a company for which they desired to raise money, made their note payable to the company and procured the bank to discount it, the company endorsing it to the bank though it was not drawn, as it was intended to have been, payable to order. It was proved that the directors had put it forward to the bank as a negotiable note, but it was their liability to which the bank looked, and that they had taken collateral security from their company for their own indemnity. In the Supreme Court it was held that the defendant was liable on the ground that the plaintiffs were entitled to have the note reformed and made payable to order so as to complete or give them the title which the defendant had offered them.

In our case the situation of the bank, if the defendant had chosen to be dishonourable and to refuse payment, would not, that I can see, have been different from that of the plaintiffs in the cases of *Jenkins v. Coomber*, [1898] 2 Q.B. 168; *Small v. Henderson*, 27 A.R. 492; and *Canadian Bank of Commerce v. Perram*, 31 O.R. 116.

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I am, nevertheless, though not without some hesitation, of opinion that this is not necessarily fatal to the defendant's case. He intended to assume a liability to the bank and believed that he had done so by means of the endorsement set forth in the chattel mortgage, upon which he considered himself liable, and which he paid when due on the footing of a liability existing thereon.

As between the mortgagor and himself, the former would, in my opinion, be estopped from saying that the payment was a voluntary one, or one for indemnity against which the defendant was not entitled to resort to the mortgage: *Atkins v. Revell* (1860) 1 DeG. F. & J. 360.

The defendant was under no obligation to repudiate his supposed endorsement even had it been present to his mind that there was an informality about it of which he could have taken advantage: *Beal v. Brown* (1866), 13 Allen, 114; *Plaut v. Storey* (1891), 131 Ind. 46; *Board of Commissioners of Bartholomew County v. Jameson* (1882), 86 Ind. 154; *Conn v. Coburn* (1834), 7 N. H. 368; *Ex parte Bishop* (1880), 15 Ch. D. 400, 417.

And having paid it under the circumstances I have mentioned, before the assignment intervened, I think the latter cannot displace his right to be indemnified out of the mortgaged property. Whether the result might have been different if the mortgage had been attacked while the note was current it is unnecessary to decide.

The case of *Lake v. Brutton* (1854), 18 Beav. 34, is distinguishable from the case at bar. There had been no agreement on the supposed surety's part to assume the debt to secure him in respect of which the mortgage had been taken by him. Here there was an agreement as between the principal and the surety; the defect was in the form into which it was put as between the surety and the creditor, a defect the surety was not bound to set up as a defence against the creditor's claim. On the whole I think we may properly affirm the judgment.

MOSS, J.A.:—I am of the same opinion.

Appeal dismissed.

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[IN THE COURT OF APPEAL.]

SIM V. DOMINION FISH COMPANY.

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May 14.

Master and Servant—Defective Plant—Negligence.

As a fisherman employed by the defendants was dragging by its wooden handle, according to the usual practice adopted on the defendants' fishing tug, a heavy box of fish along the deck, the handle, which was made of a poor quality of wood, broke, and the man fell overboard and was drowned: *Held*, that the defendants were bound even at common law to exercise due care to furnish to their men material and plant in a sound and proper condition, and that they were liable in damages.
Judgment of Rose, J., affirmed.

AN appeal by the defendants from the judgment at the trial in the plaintiff's favour in an action to recover damages for her husband's death, caused, as was alleged, by the defendants' negligence, was argued before ARMOUR, C.J.O., OSLER, and MOSS, JJ.A., on the 31st of January and 4th of February, 1901. The facts are stated in the judgment.

Garrow, K.C., for the appellants.

Lynch-Staunton, K.C., for the respondent.

May 14. The judgment of the Court was delivered by ARMOUR, C.J.O.:—This action was brought by the plaintiff, the widow and administratrix of Edward Sim, to recover damages from the defendants for the death of the said Edward Sim, caused, as was alleged, by the negligence of the defendants, and was tried on the 4th of June, 1900, at Gore Bay by Rose, J., and a jury.

It appeared that the defendants were engaged in fishing with nets in the Georgian Bay, using in doing so a steam tug, on to which they raised the nets and took out the fish, cleaned them and put them in boxes and stored them on the tug and took them to South Bay. The boxes, when filled, weighed about 200 pounds, and were moved along the deck from where they were filled to where they were stored by means of a hook inserted in the handle, by which they were drawn to the place of storing. On the 7th October, 1899, the deceased was drawing one of these boxes filled with fish with the hook inserted in the handle to the place of storing when the handle broke and

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he was precipitated into the water, and before he could be reached by the tug, although a swimmer, he sank. The tug left Goderich in the spring with only the captain, the engineer, and one hand on board and came to South Bay, where three additional men, including the deceased, were employed. The captain said that when he left Goderich he put the life-buoy right behind the engine house on a hook there, with ten or twelve fathoms of line attached to it. It was shewn, however, that it was not there when the tug arrived at South Bay, but was stowed away down below in the extreme end of the bow, where it remained till after the deceased fell overboard, and then it had no line attached to it.

The witness who saw deceased fall overboard gave the following evidence: "Q. Was the place where that life-buoy was found a convenient place. A. No. Q. If the buoy had been aft of the engine house could you have thrown it to Sim so as to reach him immediately after the accident happened. A. I could at the time."

The boxes in use when the accident happened were a different kind of boxes from those in use at the time the deceased was employed, and had been supplied by the defendants after the beginning of the season but some time before the accident, and were not used after it. McGauley, a witness, gave the following evidence: "Q. Was there any remark made in the captain's presence after these boxes were brought aboard. A. Yes, sir; some of the men made the remark. Q. Who was the man. A. Charles Oakes. Q. What did Mr. Oakes say. A. He said they were not fit for carrying fish. Q. For what reason? What did he say. A. Well, he didn't give me any answer. Q. But what had Oakes to say. Tell me all that Oakes said to him. A. He said they were not a fit thing to carry fish in, that the handles were not fit to stand, were not strong enough. Q. So he said these boxes were not strong enough. A. Yes. Q. That the handles were not strong enough. A. Yes. Q. And what remark did the captain make. A. He did not make any remark. Q. Did you hear anything said by any member of the crew. A. I heard a man that was down east say if they were not careful handling them boxes that some of them would be drowned; he warned one

man aboard that he wanted to be very careful in handling the boxes or he would go overboard, that the handles were not strong enough to stand;" and in cross-examination, referring to the deceased: "Q. Did he not warn and direct you in various ways when on the boat. A. He gave warning about them boxes. Q. You heard him give warning about these boxes. A. Yes. Q. Who did you hear him warn. A. Malcolm McLean. Q. What was the warning he gave him. A. For to not pull too hard on them boxes or the handles would come off and let him into the lake." Oakes gave the following evidence: "Q. Do you know if anything was ever said about these boxes. A. Yes, sir. Q. In the presence of the captain. A. Yes. Q. By whom. A. By me. Q. How long before this accident. A. About three weeks before. Q. Were the other members of the crew present. A. Yes. Q. Where did this conversation take place. A. At the dock at South Bay. Q. What did you say. A. I told them they were not fit to drag fish round the deck in; that somebody would go overboard; that the handles were not fit. Q. What did he say to that. A. He made no reply. Q. What objection had you to the handles. A. It was not fit; one pulled out before. Q. One had pulled out with you before. A. Yes. Q. Did the captain know that. A. No. I guess he did not know that. Q. Did you inform him of it. A. No. I told him they were not fit. Q. You say he made no reply. A. No, sir." And in cross-examination: "Q. This box, I suppose, was perfectly safe to pull straight up and down the grain of the timber. A. The fish box? Q. Yes. A. No, sir. Q. You said these boxes were not fit. A. They were not fit. Q. What do you mean by that. A. Because there was only three nails in each handle, and in my case they pulled out, they broke; there was one pulled out with me. Q. In the course of the summer. A. Yes. Q. You were on the boat from the opening of the season until the end of September, and during that period one handle pulled off; the nails pulled out. A. Yes, the nails pulled out. Q. When. A. I don't know just what day of the month but in the summer time. Q. Did anybody see that happen. A. No, sir. Q. And you did not mention it to the captain. A. No, sir. Q. And after that you spoke to him about the boxes not being safe. A. Yes. Q. And that was

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the danger you apprehended, that the nails would pull out.
A. Yes, sir."

The handle of the box which broke with the deceased was produced, and shewn to be of pine sapwood, and unfit for the purpose.

For the defence the captain gave the following evidence:
"Q. Now, about these boxes; where did you get them. A. What boxes? Q. The boxes that were in use. A. We got them four or five months before, early in the spring, at Rattlesnake Harbour. Q. Were they old or new. A. Brand new; never was fish put in them before. Q. And they had been in use all this summer. A. We kept them aboard all summer until this thing happened, after that we didn't use them any more. Q. The hook that was there, what had you been using that for. A. For pulling the boxes along the deck; it is a better thing to pull the boxes around than to lift them in a sea, because in a sea way you can't lift the boxes, because you are liable to tumble overboard, and if you have a hook you slide it along the deck and you are all safe as long as you take care of yourself and don't pull the hook around and break anything. Q. It is said that some of the men spoke to you about the boxes, that is, this class of boxes. A. Nobody spoke to me that I know of. Q. Yes, it was not spoken directly to you, but spoken of in your presence that the boxes were not safe. It was Oakes and McGauley. A. They never spoke to me that I know of, never mentioned anything about the boxes that I know of. Q. I think it was an observation made about the handles. A. No, nothing of that kind was mentioned to my knowledge. Q. Or in your presence. A. No. Q. Did you know up to this time that a handle had been pulled out. A. No. We used them all season from about the first of May, when we took them on board, and used them to the first of October, when this thing happened, and we never had any handle broken."

The captain was not asked nor did he say whether or not he himself knew that the boxes were unfit for the purpose for which they were used by reason of the handles not being strong enough, and no evidence was given for the defence contradicting the evidence of their unfitness given for the plaintiff.

The learned Judge submitted questions to the jury, which, with their answers, are as follow :—

“ 1. Q. What was the cause of the death of Edward Sim.

A. Defective timber in fish box handle.

2. Q. Was the company guilty of negligence causing death.

A. Yes.

3. Q. If so, state in what such negligence consisted. A. By not having the buoy in its proper place.

4. Q. Was the deceased guilty of any act of negligence which led to the accident. A. No.

5. Q. If so, state in what such negligence consisted. A. None.

6. Q. Assuming the plaintiff is entitled to recover, what sum do you think it fair for the defendants to pay. A. Fifteen hundred dollars (\$1500).”

When the jury returned into Court with these findings the following took place :—

“ ROSE, J.—You find, gentlemen, that the death of Edward Sim was caused by the defective timber in this box handle. Did you think that the company was chargeable with any negligence in respect of that, or did you think that was a matter the company was not negligent in respect of ?

A juror.—We think the company had a right to inspect the property to keep it in proper shape.

ROSE, J.—You say not having the buoy in its proper place. Did you wish to add also not having proper wood in the handle of the box ?

A juror.—I think death was caused by the breaking of this handle ; that it was owing to the breaking of the handle of the fish box that he went overboard. We did not consider that anything to the company in that point, but we thought by not having the boat inspected in the next question——

ROSE, J.—The inspection of the boat, gentlemen, has nothing to do with it. I think I had better perhaps make an observation or two to you and then ask you to go back and see how you answer this. Did you consider whether or not death might have been avoided if the buoy had been in its proper place ?

The jurors (unanimously).—Yes.

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ROSE, J.—If the buoy had been in the proper place, that death might have been avoided?

The jurors (unanimously).—Yes.

ROSE, J.—Then how did it occur to you that the defective timber of the fish box handle might have been discovered?

A juror.—By inspection.

ROSE, J.—Do you think there was negligence on the part of the captain in not inspecting the handles of the fish boxes?

Several jurors.—Yes.

Mr. Garrow.—The foreman just said “no.”

ROSE, J.—You say the company ought to have had some one to inspect the boxes?

The jurors.—Yes.

ROSE, J.—Do any of you differ from that?

The jurors.—No.

A juror.—We just considered that should have been done.

ROSE, J.—You added that of your own motion as another ground of negligence, and you think the deceased himself did nothing negligent?

The jurors.—No.

ROSE, J.—Then let me formulate your findings for you, and do not accept any language unless it is the language of each of you. If any one of you does not agree with it, let him speak out.

As I understand from your answers and the conversation we have had, the cause of Sim's death was the use of defective wood in the handle of the box and failure to have the life-buoy where it could have been thrown out more promptly, and you think the company was negligent in not having the wood of the handles inspected by some competent person before they were placed in the hands of the men employed upon the boat, and the company was further negligent in not having the life-buoy placed in a convenient place where access could be readily had to it. You think if the handle of the box had been of proper wood and if the life-buoy had been placed in a proper and convenient position, the death of Sim would not have occurred. Now, is there any one of you who differs from that statement.

The foreman.—There is just one point, your Honour, where we see it a little different. In the first place, with regard to the box. We wished to answer the question as short as we could, and to shew the cause of death. In the first place, he came to his death by the breaking of the box. Now, I know a little about that kind of work, and the men as a rule have to work hard, and he jumped at that handle and it broke, and that was the cause of his death. I don't say myself it was defective timber, but that is how he came by his death.

ROSE, J.—Then do you, as far as you are concerned, or do you not, find that the breaking of the handle was due to defective wood?

The foreman.—Certainly the wood was weak; it was not No. 1 wood. I am satisfied the wood was defective, but still, if a man took it easy it might not break. But they do not take it easy; they have to jump right in and get the work done.

ROSE, J.—If it had been sound, solid wood——

The foreman.—He might have been alive to-day.

ROSE, J.—Then, in addition to that you think it was the duty of the captain to have had the boat inspected. The rest is perfectly clear.”

The learned Judge thereupon gave judgment in the plaintiff's favour.

The plaintiff is, in my opinion, entitled to judgment at common law, apart from the Workmen's Compensation for Injuries Act and from sec. 26 of The Steamboat Inspection Act, 1898.

By the common law the master is bound to exercise due care for the provision and maintenance of proper materials, machinery, and plant for the work in and about which the servants are engaged: Roberts and Wallace's Liability of Employers, p. 147.

The uncontradicted evidence shewed that the fish boxes provided by the defendants were not fit for the purpose for which they were provided by reason of their defective handles, and from this evidence the inference arose that the defendants had not exercised due care in providing such boxes, and they gave no evidence whatever in excuse of their so doing, and the jury found that they were guilty of negligence in not having

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them inspected before they were put to use, and that the death of the deceased was caused by the defective timber in the fish box handle.

There was in these facts and findings sufficient to support the judgment for the plaintiff against the defendants, unless there was some conduct on the deceased's part which relieved them from responsibility for their negligence.

The jury found that the deceased was not guilty of any act of negligence which led to the accident.

The circumstance was relied on, before us, as relieving the defendants from responsibility for their negligence, that the deceased, knowing that these boxes were unfit for the purpose for which they were provided, continued to use them, and therefore must be held to have voluntarily undertaken the risk of using them.

But whether he voluntarily undertook the risk was a question for the jury, and no such question was put to them, nor did counsel suggest that it should be put to them, as should have been done if the contention that he had voluntarily undertaken the risk was intended to be relied on: *Star Kidney Pad Co. v. Greenwood* (1884), 5 O.R. 28.

And I do not think that the evidence, if it had been submitted to the jury, would have warranted a finding by them that he had voluntarily undertaken the risk, for these boxes were provided after the commencement of his employment by the defendants, and his merely continuing in the employment of the defendants and using the boxes with a knowledge of the risk, for this is all that was shewn, would not prove that he had voluntarily undertaken the risk: *Smith v. Baker*, [1891] A.C. 325; *Greenhalgh v. Cwmaman Coal Co.* (1891), 8 Times L.R. 31.

If the plaintiff had been confined to her remedy under The Workmen's Compensation for Injuries Act, I think the case must have gone to another jury to have it determined whether the captain, or some person superior to the deceased in the service of the defendants, was aware that the boxes were unfit for the purpose for which they were provided, of which there was evidence.

But the plaintiff was not so confined, but was entitled to pursue her remedy at the common law.

It is unnecessary, in the view I have taken, to determine whether or no the plaintiff was entitled to a remedy under sec. 26 of The Steamboat Inspection Act, 1898, and the finding of the jury in respect to it.

In my opinion the appeal must be dismissed with costs.

Appeal dismissed.

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[IN THE COURT OF APPEAL.]

MCCOSH V. BARTON.

Fixtures—Mortgage—Plant.

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A mortgage of an electro-plating factory "together with all the plant and machinery at present in use in the factory" does not cover patterns used in the business, sent from time to time from the factory to foundries to have mouldings made, and not in the factory at the time of the making of the mortgage.

Judgment of Ferguson, J., 1 O.L.R. 229, reversed.

AN appeal by the defendants from the judgment of Ferguson, J., reported 1 O.L.R. 229, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 10th of April, 1901.

Aylesworth, K.C., and *F. W. Casey*, for the appellants, the Rehders.

Harley, K.C., for the appellant Trish.

W. C. Livingston, for the appellant Barton.

Wilkes, K.C., and *G. J. Smith*, for the respondent.

May 14. The judgment of the Court was delivered by ARMOUR, C.J.O.:—I do not see how the judgment appealed from can be upheld.

The plaintiff claimed title to the patterns in dispute under a mortgage made by the defendant to him of certain real estate, "together with all the plant and machinery at present in use

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in the factory situate upon said lands, which said plant and machinery are and are hereby declared to be part and parcel of the real estate."

The factory was an electro-plating factory, and the patterns were made at the factory, but there being no means for moulding at the factory the patterns were sent to different foundries from time to time to have castings made from them, and the castings so made were brought to the factory and there polished, plated, and finished.

The patterns never were in actual use in the factory, and were not even in the factory at the time the mortgage was made, and were not therefore within the terms of the mortgage as "plant and machinery at present in use in the factory."

The appeal must therefore be allowed with costs and the action dismissed with costs.

Appeal allowed.

R. S. C.

[IN THE COURT OF APPEAL.]

HARGROVE V. ROYAL TEMPLARS OF TEMPERANCE.

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May 14.

Benevolent Society—Misstatement of Age—Rules Regulating Mode and Amount of Payment.

A benevolent society's certificate provided for payment to the plaintiff upon his total disability, or upon his attaining the age of seventy years, out of the total disability fund, in accordance with the laws governing the fund, sums not exceeding in the aggregate one thousand dollars. In his application, upon which it was declared the certificate was founded, the plaintiff gave his age as fifty-four when it was in fact fifty-five, the latter age being within the age allowed for entrance and the assessments and fees chargeable being the same for both ages. The plaintiff attained the age of seventy on the 10th of December, 1899, and brought this action on the 15th of May, 1900, asking for payment of \$1000. The jury found that the plaintiff's age was not material to the contract, and that the statement as to age was made in good faith and without any intention to deceive :—

Held, that the certificate was binding, and that the plaintiff was entitled to payment thereunder upon, in fact, attaining the age of seventy, but that the "laws governing the fund" applied, though not set out, and that under them the plaintiff was entitled at the time of action brought only to a benefit of \$225.

Judgment of Rose, J. reversed.

AN appeal by the plaintiff from the judgment at the trial in an action to recover the amount of a beneficiary certificate was argued before ARMOUR, C.J.O., OSLER, MACLENNAN and MOSS, J.J.A., on the 15th of January, 1901.

The rules of the defendants in question in the action, and the facts relating to the controversy, are set out in the judgments.

Washington, Q.C., for the appellant.

Z. Gallagher, for the respondents.

May 14. ARMOUR, C.J.O.:—The plaintiff joined the Royal Templars of Temperance in the year 1880 and at that time the insurance branch was in charge of what was known as the Supreme Council the headquarters of which were in Buffalo, and continued to be and was a member of the order until and when the Dominion Council of Canada and Newfoundland took charge in 1884 of the insurance branch so far as concerned those in Canada insured.

The following instrument was adduced in evidence :

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"Recording Secretary's Certificate.

This is to certify that the within named Joseph Hargrove is a member in good standing in Imperial Council No. 5 located at Hamilton; that he held beneficiary certificate No. 7027 (return the certificate if possible with this application) issued by the Supreme Council R. T. of T. which was suspended for non-payment of call No. 188; that I believe him to be a good healthy risk and a proper person to receive a beneficiary certificate from the Dominion Council. Dated at Hamilton this 25th day of October 1884.

Sgd., John Garry, R. Secy.

Per H. A. Martin, S.C.

Joseph Hargrove I was born in the Queen's County Ireland County of and of December on the day of December 1830 and now am 54 years old, nearest birthday. I am insured. My P.O. address is Hamilton, Ontario. If accepted I hereby direct that the certificate issued to me be made payable to Mary Hargrove.

CONTRACT.

To the Dominion Council R. T. of T.:

I Joseph Hargrove having made application for a beneficiary certificate in the order of Royal Templars of Temperance hereby covenant promise and agree to and with the Dominion Council of said order of Royal Templars of Temperance that I will abide by the decision of the Dominion medical examiner in his approval or disapproval of the within report of medical examiner as to my physical condition and that I will not hold the Dominion Council or the order responsible for any benefit whatever should death or disability occur prior to the approval of the within report of medical examiner by the Dominion medical examiner, that if admitted to participate in the benefits of said order I will abide by all the laws rules and regulations thereof, that I will faithfully maintain a pledge of total abstinence from the use of all intoxicating liquors as a beverage and that I will pay all assessments levied by the Dominion Council. I certify that the answers made by me to the questions propounded by the medical examiner and also answers made to all other questions herein appearing are each

and every one of them true to the best of my knowledge and belief and I agree that any concealment of facts or any untrue or fraudulent statement made by me shall forfeit my right to all the benefits of the order and to membership therein. I further agree that should I at any time violate my pledge of total abstinence or be suspended or expelled for a violation of any of the laws of the order or for non-payment of dues or assessments or should I die in consequence of a duel or by the hands of justice or should I die by own hand, within one year from the date of my certificate whether sane or insane then all rights which either myself the person or persons named in certificate my heirs or legal representatives may have upon the beneficiary fund of the order shall be forfeited.

In witness whereof I have hereunto affixed my hand this
day of 188 .

Signed JOSEPH HARGROVE.

Signed in presence of
(Sgd.) H. A. Martin."

Endorsed thereon was the following:—

"MEDICAL EXAMINER'S CERTIFICATE.

I hereby certify that the within named Joseph Hargrove was examined for a beneficiary certificate and accepted by the supreme medical examiner of the R. T. of T., that he has not contracted any disease or done anything to impair his health or increase his liability to contract disease since that date and I believe him to be a first class healthy risk. I unhesitatingly recommend that a certificate be issued to him. Dated at Hamilton this 16th day of October 1884.

(Sgd.) C. S. E. HUSBAND, M.D.,
Medical Examiner."

This instrument was endorsed as follows:—

"No. of certificate 1829.

Recorded Oct. 28, 1884.

APPLICATION FOR CERTIFICATE

and

MEDICAL EXAMINER'S REPORT.

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Name of applicant James Hargrove.

Am't of certificate \$2000.

Name of Council—Imperial.

No. of Council—5.

Where located—Hamilton.

If initiated when?

Name and P.O. address of Beneficiary Secretary.

Name and P.O. address of Medical Examiner.

After a careful review of this application and the report of the Medical Examiner I hereby approve the same and I recommend that a certificate be issued.

Signed this 1st day of Jan'y., 1885.

(Sgd.) B. E. MCKENZIE, M.D.,

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Dominion Medical Examiner."

Upon this application a beneficiary certificate was issued by the defendants to the plaintiff on the 28th October 1884 and numbered 1829 certifying "that Joseph Hargrove a member of Imperial Council No. 5 of Ontario is entitled to all the rights and privileges guaranteed to beneficiary members of the order by our constitution and laws, and is issued upon the express condition that he shall while a member of said order faithfully maintain his pledge of total abstinence and comply with all the laws rules regulations and requirements of said order otherwise it shall be of no effect, and in case he has faithfully maintained his pledge of total abstinence and has not otherwise forfeited his membership in said order at the time of his decease then the person or persons hereinafter named shall be entitled to the sum of one dollar from each and every beneficiary member in good standing not exceeding two thousand members, or should he become totally disabled for life so as to prevent him following his own or any other avocation, provided such disability did not arise from vice or immorality on his part, then in case he has faithfully maintained his pledge of total abstinence and has not otherwise forfeited his membership in said order he shall upon satisfactory proof of such total disability be entitled to one half of the above mentioned amount, the remaining one half to be paid at the time of his decease, provided he shall have faithfully maintained his pledge of total abstinence and com-

plied with all the laws rules and regulations of the order, and he now directs that in case of his decease it be paid to Mary Hargrove wife."

This certificate was replaced by a beneficiary certificate issued by the defendants to the plaintiff on the 30th December, 1891, and numbered 9843 "upon the express condition that the statements made by him in his application for select membership and for the benefits of the order are a part of this contract, that he has been raised in accordance with the ritual of the select degree, and upon condition that he faithfully maintains his pledge of total abstinence and complies with all the laws, rules and orders governing or that may hereafter be enacted by the Dominion Council of Canada and Newfoundland Royal Templars of Temperance to govern the order and its benefit fund," by which certificate it was witnessed "that these conditions being complied with the Dominion Council of Canada and Newfoundland Royal Templars of Temperance promises and agrees upon receiving satisfactory evidence of the death of said member and of his being in good standing in the order at the time of his death and upon the surrender of this certificate to pay out of the benefit fund in accordance with the laws governing said fund a sum not exceeding two thousand dollars, but if less than that amount a sum equal to one dollar for each and every select member in good standing; or should he become totally disabled for life so as to prevent him following his own or any other avocation, provided such disability does not arise from vice or immorality on his part, he shall upon proof of such total disability satisfactory to the board of directors be entitled to a further sum equal to one-half of the above-mentioned amount as specified in the constitution of the said Dominion Council, payment of death benefit to be made to Mary Hargrove who bears to the said member the relation of wife."

This certificate was replaced by the beneficiary certificate sued on, issued by the defendants to the plaintiff on the 21st day of April, 1896, and numbered 38, the contractual parts of which are as follows:—

"This certificate is issued by the authority of the Dominion Council of Canada and Newfoundland Royal Templars of Temperance to Joseph Hargrove a select member of Wentworth

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Council No. 149, located at Hamilton, Ont., upon the express condition that the statements made by him in his application for select membership and for the benefits of the order are a part of this contract, that he has been raised in accordance with the ritual of the select degree, and upon condition that he faithfully maintains his pledge of total abstinence and complies with the constitution, laws, rules and orders governing or that may hereafter be enacted by the Dominion Council of Canada and Newfoundland Royal Templars of Temperance to govern the order and its benefit funds.

This certificate witnesseth that these conditions being complied with the Dominion Council of Canada and Newfoundland Royal Templars of Temperance promises and agrees upon receiving evidence satisfactory to the board of directors that the said member has become totally disabled and that such total disability is conclusively permanent, or that he has attained the age of seventy years, and of his being in good standing in the select degree, upon the production or surrender of this certificate to pay out of the total disability fund in accordance with the laws governing such fund sums not exceeding in the aggregate one thousand dollars but if less than that amount sums not exceeding an aggregate equal to one dollar for each and every total disability benefit member in good standing, provided always that such total disability does not arise from vice or immorality on his part.

It is herein provided and agreed that no assignment of this certificate shall be valid and that it shall become null and void if said member fails to comply with the constitution rules and regulations of the order of Royal Templars of Temperance.

Provided also that this certificate shall not go into force until and unless it has been signed by the select councillor and beneficiary secretary, sealed with the seal of the select council, and the member has been raised to the select degree in accordance with the constitution and ritual thereof at a legal meeting and has signed the acceptance subscribed hereto. No select council has power to waive any of the provisions hereof.

I accept this certificate upon conditions named herein."

No terms or conditions of the contract were set out by the corporation in full on the face of this certificate except as appear

therein and no terms or conditions of this contract were set out by the corporation on the back thereof and those articles or provisions of the constitution by-laws or rules which contained all the material terms of the contract not in the certificate itself set out were not indicated therein by particular references except as appear therein.

This action was commenced on the said last mentioned certificate on the 15th May 1900 and the defendants by their statement of defence alleged (2) that at the time the plaintiff made application for the said certificate in the defendant association he agreed amongst other things to abide by all the laws rules and regulations of the defendant association and to faithfully maintain a pledge of total abstinence from the use of intoxicating liquors as a beverage and to pay all assessments levied by the defendant association and that any concealment of facts and any untrue or fraudulent statement then made by the plaintiff should forfeit the plaintiff's right to all the benefits of the order and to membership therein and that in case he at any time violated his pledge of total abstinence or was suspended or expelled for the violation of the laws of the order that he should forfeit all rights that he may or might have upon the beneficiary funds of the order. (3) The defendant association said that the plaintiff made fraudulent and untrue statements and concealed material facts at the time of making the said application and by reason thereof the plaintiff had forfeited all rights to recover the moneys sued for on the certificate. (4) They further said that the plaintiff did fraudulently misrepresent his age at the time of procuring the said certificate and by reason of said fraud or misrepresentation the plaintiff induced the defendants to grant him a certificate for a monthly assessment much less than the plaintiff was entitled to pay and for much less than the plaintiff would have been compelled to pay had he represented his age to be that which he now alleges was then his true age and except for such misrepresentation said certificate would not have been issued. (5) That if the plaintiff is now seventy years of age (which they do not admit but deny) the plaintiff is not entitled to anything under the contract and the certificate at all events until the 10th day of December 1900 and therefore this action is premature, but the

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defendants do not admit the plaintiff will be entitled to recover on the certificate at all, in fact the defendants deny the plaintiff's right to recover in toto. (6) If it be held that the plaintiff is entitled to anything on the said certificate that he is only entitled to a very small portion of the \$1000 under the laws rules and regulations and amendments. (7) The plaintiff has broken the rules laws and regulations of the order including his pledge of total abstinence and he has therefore forfeited any and all rights which he might otherwise have had in the association and in the certificate sued upon herein.

The plaintiff in reply to the second paragraph of the statement of defence said that the terms and conditions referred to in said paragraph were not set out by the defendants in full on the face or back of the instrument forming or evidencing the contract as required by the statutes relating to insurance in force at the time such contract was made and that the said terms and conditions were in no way binding upon the plaintiff, and he joined issue on the third, fourth, fifth and seventh paragraphs of the statement of defence. And in answer to the sixth paragraph of the statement of defence the plaintiff said that the laws, rules and regulations and amendments thereto referred to in said paragraph are not binding upon the plaintiff, not having been set out by the defendants in full on the face or back of the instrument forming or evidencing the contract and not being indicated by particular reference thereto as required by the statutes relating to insurance in force at the time of making the contract. And he further said that if there was any error or misstatement in reference to the plaintiff's age the defendants did not void the contract between the parties within thirty days after the error in age came to the knowledge of the defendants.

The cause was tried on the 17th October, 1900, at Hamilton, by Rose, J. and a jury, when the facts already stated were shewn and the plaintiff gave evidence that he was born on the 10th December, 1829, that his only means of knowing it was his discharge from the army, which he produced, dated the 3rd March, 1852, which stated that he was enlisted on the 10th June, 1847, and that when he was going to Dublin to enlist his father told him that he was seventeen years and six months old, all this evidence being admitted without objection. He could not account for the

statement in the application, dated the 25th October, 1884, that he was born on the — day of December, 1830, and was then 54 years of age nearest birthday, that he did not think he said such a thing and that he could not have said that possibly, but he admitted signing the application after it was filled up, that he could not tell how this date happened to get into the application except the secretary made a mistake, that was the only way he could account for it, he had nothing to go by only his discharge. Martin, who drew up the application, said that he got the age from the plaintiff, but had no recollection of the circumstance. Some time in September or October, 1899, the plaintiff furnished to the manager of the insurance branch of the defendants and to the secretary of the defendants his discharge from the army and they took a copy of it which they produced. It was shewn that the amount of the assessment payable by the plaintiff had he stated in his application that he was born on the 10th December, 1829, would have been just the same as the amount payable according to the statement of his age in the application. It was also shewn that the plaintiff was a select member in good standing on the 10th day of December, 1899, that the amount of assessments paid by him in respect of his insurance since the 1st July, 1894, was \$22.50 and that there were over one thousand total disability benefit members in good standing on the 10th December 1899.

The several constitutions of the defendants from 1884 to 1900 both inclusive, certified under sub-sec. 11 of sec. 74, R.S.O. 1897, ch. 203, were put in evidence subject to objection. Sections 1 and 3 of article 12 of the constitution in force at the time this certificate was issued and in force on the 10th December, 1899 are as follows:—

“Section 1. Any select member holding a total disability benefit certificate becoming totally disabled for life and thereby rendered unable to follow any avocation (provided such disability did not arise from intemperance or immoral conduct on his part) upon furnishing from year to year proofs of such total disability on forms provided by the Dominion Council satisfactory to the board of directors shall receive annually a sum equal to one fourth of the total disability benefit during the continuance of such disability provided always that the member remains

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true to the obligation of the order and continues to pay all total disability benefit assessments that may be levied. Provided also that in case of the death of a member while receiving total disability benefit there shall be paid to his legal representatives the proportion of the next annual instalment that has accrued between the last total disability payment and his death which shall be a full satisfaction of such total disability. All sums paid must be endorsed upon the back of the beneficiary certificate and acknowledged by the member before the select councillor of the council or a notary public. No claim shall be considered unless the total disability is certified by two medical examiners of the order the expense of such examination being defrayed by the applicant. Nor shall a claim be considered after the death of the beneficiary. All conditions the consequence of chronic disease shall be of two years duration as such before a claim shall be entertained.

Section 3. Any select member holding a total disability benefit certificate and who has attained the age of 70 shall be considered totally disabled within the meaning of this article and under the regulations provided in sec. 1 of the same as far as they may apply. Nevertheless no member shall be entitled under this section to receive a full instalment of the benefit until the first of July 1914 but he shall have the option of receiving such a benefit as shall be equal to as many one-hundredth parts of the full benefit as he shall have contributed dollars to this fund from the first of July 1894."

Evidence was given to shew that the plaintiff had violated his pledge of total abstinence all of which the plaintiff contradicted and swore that he had always kept it.

The learned Judge left the following questions to the jury, which they answered as follows:

"1. Q. What was the plaintiff's age on October 25th 1884 when he made application for insurance?

A. Fifty-four years 10 months and 15 days.

2. Q. If in such application the plaintiff misrepresented his age was the fact of his age one material to the contract?

A. No.

3. Q. Was the statement as to his age made in good faith and without any intention to deceive?

A. Yes.

4. Q. Did the plaintiff violate his pledge prior to the year 1900 ?

A. No not proven.

5. Q. Did the plaintiff violate the pledge during 1900 ?

A. No."

The learned Judge thereupon gave judgment dismissing the action with costs.

At the time the beneficiary certificate sued on was issued this provision of the law was in force and is applicable to these defendants: "Where the age of a person is material to any contract and such age is given erroneously in any statement or warranty made for the purposes of the contract such contract shall not be avoided by reason only of the age being other than is stated or warranted if it appears that such statement or warranty was made in good faith and without any intention to deceive, but the person entitled to recover on such contract shall not be entitled to recover more than an amount which bears the same ratio to the sum that such person would otherwise be entitled to recover as the premium proper to the stated age of such person bears to the premium proper to the actual age of such person, the said stated age and the actual age being both taken as at the date of the contract. Provided that in no case shall the amount receivable exceed the amount stated or indicated in the contract," and I see no reason why this provision is not applicable to this contract.

The plaintiff's age was erroneously given in his application made for the purposes of this contract and if material to the contract as statements as to age usually are in contracts of insurance of the person, the statement or warranty contained in the application as to his age was made in good faith and without any intention to deceive as found by the jury and consequently the contract cannot by reason only of the age being other than as stated or warranted, be avoided, and if his age was not material to the contract as the jury found the erroneous statement of it could not avoid the contract.

The assessments payable by the plaintiff would have been just the same had his true age been stated in his application as they were according to his age as stated therein and I see no

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reason to doubt that this certificate would have been issued to him had his true age been stated in his application just as it was his age being stated as it was erroneously therein.

I am of the opinion therefore that the plaintiff having attained the age of seventy years on the 10th December 1899 became entitled to the total disability benefits payable under and by virtue of this certificate.

The covenant made by the defendants with the plaintiff in this certificate is "to pay out of the total disability fund in accordance with the laws governing such fund sums not exceeding in the aggregate one thousand dollars but if less than that amount sums not exceeding an aggregate equal to one dollar for each and every total disability benefit member in good standing."

It is difficult to say what the words "but if less than that amount" refer to or mean and I cannot pretend to conjecture but perhaps it is not necessary to do so in the present case.

But the covenant being to pay out of the total disability fund in accordance with the laws governing such fund the plaintiff was bound to shew such laws, unless he was excused from doing so by the provisions of R.S.O. 1897, ch. 203 sec. 144, in order to establish a breach of them and so a breach of their covenant by the defendants.

The laws governing such fund so far as they are involved in this case are secs. 1 and 3 of article 12 above quoted.

It is very difficult to say what the full meaning of these sections is but the meaning of them is clear to this extent, which is sufficient for the present litigation, that the plaintiff was entitled to recover in accordance with them on the 10th December 1899 the sum of two hundred and twenty-five dollars.

It was contended that the plaintiff was entitled to recover the whole one thousand dollars on that date because the defendants had not complied with the provisions of R.S.O. 1897, ch. 203, sec. 144, sub-sec. 1, but I do not think that these provisions apply to work such a result in a case like the present where the amount insured is only payable in accordance with the laws governing the fund out of which it is payable.

The case was fairly submitted to the jury on the issue as to the violation of his pledge by the plaintiff, the evidence was

contradictory, it was a case in which everything depended upon the opinion the jury formed of the credibility of the witnesses, and I cannot say that the verdict was one which a jury viewing the whole of the evidence reasonably could not properly find.

In my opinion therefore the appeal should be allowed with costs and judgment entered in the court below for \$225 with full costs of suit.

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OSLER, J. A.:—The action is brought upon beneficiary certificate No. 38, dated 21st April, 1896, which “replaced” beneficiary certificate No. 9843, dated 30th December, 1891, which had “replaced” beneficiary certificate No. 1829, of the 28th October, 1884, all in favour of the plaintiff and all founded upon his application for the last mentioned certificate, undated, but which appears from the endorsement thereon to have been made some time in the month of October, 1884. Certificate 1829 provided substantially for payment of \$2,000, one-half in the event of the beneficiary becoming totally disabled for life, and the remaining one-half “at the time of his decease.” Said certificate does not refer in terms to the application. Certificate 9843 purports to be issued upon the condition that the statements made in the application for select membership and for the benefit of the order were a part of the contract and provided for the payment as a death benefit of a sum not exceeding \$2,000, or, should the beneficiary become totally disabled for life then upon proof thereof for payment of “a further sum equal to one-half of the above mentioned amount.”

The existing certificate No. 38 bears to be issued to the plaintiff upon the express condition *inter alia* that the statements made by him in his application for select membership and for the benefit of the order “are a part of this contract” and witnesses “that these conditions being complied with,” the defendants agree upon receiving evidence satisfactory to the board of directors that the member “has become totally disabled and that such total disability is conclusively permanent or that he has attained the age of 70 years,” and of his being in good standing in the select degree to pay out of the total disability fund in accordance with the laws governing it sums not standing in the aggregate \$1,000.

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The foundation of the certificates was the application of October, 1884, and it is not denied that it is this application which is a part of and therefore to be read into, the agreement on which the action is brought.

In this application the plaintiff states *inter alia* that he was born in Queen's County, Ireland, "on the day of December, 1830, and am now 54 years old nearest birthday."

The plaintiff alleges that he attained the age of 70 years on or about the 10th December, 1899, and is, therefore, entitled to be paid under the terms of the certificate the sum of \$1,000.

The defendants, while denying the plaintiff's right to recover under any circumstances for reasons assigned, say that if he is at the date of pleading 70 years of age, which they do not admit, but deny, he was at all events not entitled to anything under the contract and certificate until the 10th December, 1900, and, therefore, that the action was prematurely brought, having been commenced on the 15th May, 1900.

There was evidence at the trial on which the jury found, and in all probability correctly found, that plaintiff's age at the time he made his application was 54 years, 10 months and 15 days, and that his statement as to age in the application was made in good faith and without intent to deceive.

They also found that the statement was not material.

It must, therefore, be taken that the plaintiff was born in December, 1829, and not in December, 1830, as stated in his application, and that he attained the age of 70 years on the 10th December, 1899, instead of 10th December, 1900, as would have been the case had the statement as to his age in his application been true.

The assessment or premium for such a certificate as the one in question was the same for a person of 55 years of age on his nearest birthday as for one of 54, so that if the plaintiff had stated his age truly in the application his assessment or premium would have been the same as that which he actually paid.

The defendants have contracted to pay the plaintiff at 70 years of age and he had in truth and in fact attained that age before the action was brought.

The only question, therefore, on this branch of the case is whether or not the plaintiff is estopped by the statement in his application from shewing what the fact really is.

I think the plaintiff cannot invoke the benefit of sec. 149 of the Insurance Act, R.S.O. 1897, ch. 203, as to this, as the defendants are not asserting that the contract is void, but only that the action is prematurely brought, the plaintiff not having attained the stipulated age.

There would, moreover, be considerable difficulty in applying to such a beneficiary certificate as this, the correlative relief given by that section to the insurer, if the statement of the plaintiff's age were held to be material.

The clause which in my opinion does apply is sub-sec. 3 of sec. 144: "The question of materiality in any contract of insurance whatsoever shall be a question of fact for the jury or for the court if there be no jury, and no admission, term, condition, stipulation, warranty or proviso to the contrary contained in the application or proposal for insurance or in the instrument of contract or in any agreement or document relating thereto shall have any force or validity."

The statement as to the age of the applicant has relation to the premium or assessment required in respect of an insurance payable at the age of seventy years.

If that premium or assessment be the same whether an applicant for such an insurance is 54 or 55 years of age and the latter is an insurable age, of which there is no evidence to the contrary, it was open to the jury to find, as they have done, that the statement of the age as 54 instead of 55 was not a material one, especially considering the fact that by the terms of the certificate itself the arrival of the insured at the stipulated age is one of the matters to be proved to the satisfaction of the board of directors. When the rules of the order are examined the arrival at the age of seventy seems to be no more than a species of total permanent disability to be proved, just as any other total permanent disability must be proved. If the plaintiff were relying upon the latter as the ground of his claim, the mistake as to age, the premium for both years being the same, would I think be immaterial. The

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same must be said when it is the actual arrival at the age of 70 which is relied upon.

As regards the other defences relied upon I think we cannot interfere with the findings of the jury, unsatisfactory as we may think them.

The question then arises as to the amount for which judgment should be entered, and as to this the contract and rules to which it is subject are not very clear. The plaintiff relies upon section 153 (1) of the Insurance Act which provides that where an event has happened on the occurrence of which any benefit or insurance money is payable under the contract but the amount payable is matter of dispute, the amount payable by the insurer to the beneficiary shall *prima facie* be the amount stated or indicated in the contract and it shall lie on the insurer to prove the contrary; and she contends that she is entitled to judgment for \$1000 payable *in praesenti*. She also contends that the rules by virtue of which any lesser sum may be payable or payment deferred ought to have been set forth in full on the face or back of the certificate or indicated thereon by particular reference as required by section 144 (1) (b), and that as this was not done such rules must be disregarded.

I think that neither of these sections assists the plaintiff and for the following reasons: On the face of the contract it is obvious that the undertaking of the defendants is not to pay \$1000 absolutely. It is to pay "out of the total disability fund *in accordance with the laws governing such fund* sums not exceeding in the aggregate \$1000, but if less than that amount sums not exceeding an aggregate equal to one dollar for every total disability benefit member in good standing." I am not sure that I understand the meaning of the qualification "but if less than that amount." It may mean that if the *benefit fund* raised in the manner provided by the rules (Art. XIII., sec. 3) is less than sufficient to meet the claims against it the clause in question shall come into play, but it is not necessary to decide how this is, no point having been made on it. Whatever be the sum to be recovered, it is to be paid (or adjudged) "in accordance with the laws governing the total disability benefit fund," and as these are the terms on

which the only contractual obligation of the defendants is expressed, we have to resort to these rules to ascertain the measure of the plaintiff's rights, and thus there is nothing on which sec. 153 (1) can operate, and the insurance contract does not offend against the provisions of sec. 144 (1) (b) above noted (which comes through 60 Vict. ch. 36 (O.) from 55 Vict. ch. 39, sec. 33 (O.)), because there is no term, condition, stipulation, warranty, or proviso, "modifying or impairing" the effect of the insurance contract which is not set out therein. We are driven, it is true, to the rules to find out what is the whole contract but there is nothing in them which "modifies or impairs" any contract set forth in the certificate, for without them we cannot find any contract at all. They simply complete the contract by shewing in what manner and out of what fund the amount is to be paid.

Then under Art. XIII., which provides for total disability assessments, we find by sec. 1 that the rate of assessment to be paid by beneficiary members is proportioned (1) to different classes of ages and (2) the amount of the certificate held by the beneficiary: *e.g.* class H. takes in ages from 48 to 50, the member paying according to the amount of his certificate, the holder of a certificate for \$250 paying 32c. per month, \$1,000, \$1.25 per month, and so on.

And sec. 2 provides that 40 per cent. of each regular assessment shall constitute a distinct reserve fund, which, with the interest, shall provide for liabilities which mature through the attainment by the members of the age of 70, the remainder of the assessment going to such other cases of total disability.

Art. XII. deals with the subject of total disability benefits.

Any select member holding a total disability benefit certificate, *i.e.* for sums ranging from \$250 to \$1,500, becoming totally disabled for life shall receive annually a sum equal to one-quarter of the total disability benefits during the continuance of such disability, provided he remains true to the obligations of the Order and continues to pay his assessments. All sums paid are to be endorsed upon his certificate and go so far in discharge of all claims under it. If he should die before it is paid in full the next succeeding annual instalment is to be apportioned and the certificate will thus be discharged.

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It does not form in any other respect the subject of a death claim.

The scheme of the insurance therefore is to create a fund which will meet liabilities incurred by the order to each beneficiary in case of his becoming totally disabled, on proof thereof in manner provided by another section of the article, and the one-fourth of the total disability benefit is the one-fourth of the whole amount mentioned in any particular certificate which is thus payable in four yearly instalments, if the beneficiary lives so long. And each instalment would appear to be the subject of a new and separate demand, payable as it accrues.

Section 3 of this article confers a special right upon the select member who holds a total disability benefit certificate. Such a member who has attained the age of seventy shall be considered totally disabled within the meaning of the article and under the regulations provided in section 1, so far as they apply.

This would seem to make the amount of the certificate payable in the same manner as in the ordinary case of total disability strictly so called, but the section provides: "Nevertheless no member shall be entitled under this section to receive a *full instalment* of the benefit until the 1st of July, 1914, *but* he shall have the option of receiving such a benefit as shall be equal to as many one hundredth parts of the *full benefit* as he shall have contributed dollars to this fund from the 1st of July, 1894."

As a *full instalment* of the benefit appears under rule one of Art. XII. to be one-fourth thereof, and as the chances of a beneficiary in the plaintiff's situation surviving until 1914 are somewhat problematical the seventy years clause would seem in his case to be rather an illusory one. But there can be no objection to his now receiving such a benefit as is provided for in the latter part of the section, the amount of which, having regard to what he has contributed to the fund, is \$225, leaving his future rights, if any, under the certificate either as regards his age or the occurrence of actual total disability to be hereafter determined in another action if that should be necessary. At present he is entitled to receive nothing beyond the above

mentioned amount for which he should have judgment with full costs of suit.

To this extent the appeal should be allowed and with costs throughout.

MACLENNAN, and MOSS, JJ.A., concurred.

Appeal allowed.

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[IN THE COURT OF APPEAL.]

TRUSTS AND GUARANTEE COMPANY

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Limitation of Actions—Annuity—Will—Charge on Land—Arrears—Lunatic.

By a will made in 1872 a testator, who died in the same year, devised land to two sons, "subject to the payment by my said two sons of the sum of \$200 per annum, for the benefit of my son Thomas Anson, which said sum, or annuity, or so much thereof as shall be reasonably necessary for the support and maintenance of my said son Thomas Anson, shall be paid yearly and every year, for and during the natural life of my said son Thomas, to the person or persons who may be his guardian or guardians." The son Thomas Anson was of age at the time of the testator's death but was of unsound mind, and he was declared a lunatic in 1898, and the plaintiffs were appointed committee of his person and estate. After the father's death the son lived with his mother, to whom from time to time till February, 1889, payments were made on account of the annuity:—

Held, that the annuity was charged on the land; that it was, therefore, by virtue of sec. 2 (3) of the Limitations Act, R.S.O. 1897 ch. 133, rent within the meaning of that Act; that the payments to the mother, who was the guardian *de facto*, were good, and that the statute did not begin to run till the last of them was made: that apart from the question of disability the right of action would have been barred at the expiration of ten years from that time; but that by secs. 43 and 44 the time was extended for five years from the removal of disability, or for twenty years; and that, therefore, an action brought in February, 1900, was in time and that six years' arrears could be recovered.

Judgment of MacMahon, J., 31 O.R. 504, affirmed.

AN appeal by the defendants from the judgment of MacMahon, J., reported 31 O.R. 504, was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 27th of September, and 1st of October, 1900. The facts are stated in the report below and in the judgments in this Court.

Aylesworth, Q.C., for the appellants.

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A. C. Macdonell, and J. T. C. Thompson, for the respondents.

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May 14. MACLENNAN, J.A.:—By the will of Thos. Grange, who died on the 13th of September, 1872, he gave certain lands to his two sons, William and Hugh Scott Grange, as tenants in common, two-thirds to William and one-third to Hugh, "subject to the payment by my said two sons of the sum of \$200 per annum for the benefit of my son Thomas Anson, which said sum, or annuity, or so much thereof as shall be reasonably necessary for the support and maintenance of my said son Thomas Anson, shall be paid yearly and every year for and during the natural life of my said son Thomas, to the person or persons who may be his guardian or guardians."

The will was made a few weeks before the testator's death, and at that time Thomas Anson was twenty-four years of age, and a person of unsound mind. No guardian or committee of the estate or person of Thomas Anson was ever appointed until the 2nd September, 1898, when the plaintiff company was appointed the committee of his estate and person; but after the death of his father he always lived, and still lives, with his mother, who has maintained, supported, and taken care of him during all that time.

The present action was brought on the 10th June, 1899, by the committee of the lunatic alone against the Trusts Corporation of Ontario as administrators of the estate of William Grange, and against Hugh Scott Grange. On the 27th September an order was made adding Florence Grange and Eveline Grange, and also the Trusts Corporation of Ontario in their individual capacity, as parties defendants. The trial was on the 14th and 15th of November, and by the judgment pronounced on the 14th February, 1900, the lunatic Thomas Anson was made a party plaintiff; and the National Trusts Company, Limited, as administrator *ad litem* of the estate of Margaret Jane Grange, was made a defendant.

The defence is the Statute of Limitations, which is sought to be avoided by payments on account of the annuity made by or on behalf of the owners of the land to the plaintiff's mother as his guardian, and by the fact that the plaintiff Thomas Anson

has been a person *non compos mentis* ever since his father's death.

It is proved that between 1878 and 1889 Mr. Gibson, a solicitor, acted as an agent of the property devised to William and Hugh, managed the letting to tenants, looked after and paid for repairs, collected the rents, and accounted for the whole, after deducting a commission. During that time Mr. Gibson made the following payments to the lunatic's mother, expressly on account of the annuity: On the 17th July, 1880, \$50; 7th February, 1883, \$100; 23rd January, 1884, \$50; 13th June, 1885, \$50; February 21st, 1887, \$50; April 30th, 1888, \$50; and 9th February, 1889, \$50. It was contended that these payments did not affect the running of the statute, because they were neither made nor received by persons authorized to do so. To determine this point it is necessary to see how the title stood during the time when the payments were made. First as to the two-third share devised to William. On the 9th November, 1877, William assigned his share to Hall for the benefit of creditors. On the 26th October, 1878, Hall sold and conveyed in fee to Margaret Jane Grange, wife of William, and one Arabella Grange, and the latter and her husband on the 7th December, 1878, released to Margaret Jane. From that time until her death on the 8th July, 1889, therefore, Margaret Jane, the wife of William Grange, was the owner of the two-third share, except that on the 31st August, 1888, she and her husband had made a mortgage to the Canada Permanent Loan Company, which is now held by the defendants the Trusts Corporation of Ontario.

The other third share continued to be vested in Hugh Scott from the time of his father's death until the 1st September, 1886, when he mortgaged it to his brother William, who, on the 1st September, 1888, assigned the mortgage to the Canada Permanent Company as collateral security for the other mortgage. By the terms of Hugh's mortgage to William, the debt thereby secured was to be paid by Hugh's one-third share of the rents of the property, which William was authorized to receive, and whereby William became virtually mortgagee in possession of that one-third. Mr. Gibson was appointed agent of the property by William, but the first five payments above mentioned

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by Mr. Gibson were expressly ratified and approved in writing by William and his wife and also by Hugh, and having been made out of the rents of the property, there can be no question they were good payments on account of the annuity, so far as the owners of the property are concerned. The remaining two payments were authorized and approved of by William, acting on behalf of his wife, as well as under his mortgage from Hugh. I think, therefore, that all the payments were made by parties authorized to make them on account of the annuity. I also think that the lunatic's mother, being his guardian *de facto*, was competent to receive them. The testator seems to have made a competent provision for his widow, and she maintained and supported the lunatic from the time of her husband's death. She was under no legal obligation to do so; and could have claimed from year to year so much of the annuity as would have been reasonable reimbursement for the cost of his maintenance; and it is quite clear that the Court would allow and ratify, to that extent, all payments made to her. The first payment was made to her after she had maintained him for seven years; and no question has been made, or could be made, that the respective sums paid were, when paid, not all properly due to her for past maintenance; nor any suggestion that he had, or was entitled to, maintenance from any other source. See *Edwards v. Abrey* (1846), 2 C.P. Coop. 177; *Wilkinson v. Letch* (1760), *ib.* 195; *In re Berry* (1849), 13 Beav. 455; *Conduit v. Soane* (1840), 5 M. & Cr. 111; and other cases cited, Phillips on Lunacy, pp. 25, 26. It follows from this that when these payments were made the mother was capable of giving a discharge for them within the meaning of sec. 23 of the Real Property Limitation Act, and these payments were therefore payments of the annuity within the statute.

It is clear that this annuity is not an express trust, and so is not saved by sec. 30: *Francis v. Grover* (1845), 5 Ha. 39; *Hodge v. Churchward* (1847), 16 Sim. 71; *Dickinson v. Teasdale* (1862), 1 De.G. J. & S. 52; and *Cunningham v. Foot* (1878), 3 App. Cas. 974; Lewin on Trusts, 10th ed., p. 1071.

Whether the action is to be regarded as having been commenced on the 10th June, 1899, or not until the 14th February, 1900, when the lunatic himself was for the first time

made a party, I am of opinion it was brought in time. The annuity is a rent within sec. 4 of the Act by virtue of the interpretation sec. 2 (3), as an annuity charged upon land. And by sec. 5 (1) (2) where a person claiming rent has been in receipt of such rent and has, while entitled thereto, discontinued such receipt, then the right to bring an action shall be deemed to have first accrued at the last time at which any such rent was so received. The first of the seven payments was received on the 17th July, 1880, and the last on the 9th of February, 1889, and so the plaintiff's right first accrued on the last mentioned date. If he had not been a person of unsound mind his right would have been barred on the 9th February, 1899, and the action would have been too late. But being a lunatic his time was extended by sec. 43 for five years after his disability ceased, or after his death, whichever should first happen, so long as (sec. 44) that should be within twenty years from the accrual of the right of action. This extended time had not elapsed when the action was brought, whatever date be regarded, and so it is clearly not barred.

The further question is as to arrears, and that depends on sec. 17. I am unable to see any ground on which the plaintiff can be deprived of arrears for six years next before the commencement of the action. In the case of an annuity, such as the present, no action, so far as I can perceive, can be brought for anything else than arrears. If there are no arrears, no action can be brought. But for this section, if an action were brought in time, the whole of the arrears would be recoverable. The case of *Hughes v. Coles* (1884), 27 Ch. D. 231, which was relied on does not, I think, govern the case. In that case there was an express trust; and no question was made about future payments, or that they were barred. But Kay, J., held that because the time had elapsed which, but for the trust, would have barred the annuity, the arrears were wholly barred by that lapse of time; in other words, that the trust saved the future payments but not the arrears. It seems difficult to perceive how the annuity could be regarded as saved for the future, to any useful purpose, if, the moment a gale became due, and was not paid, it became barred as an arrear. That case was remarked upon in *Dower v. Dower* (1885), 15 L.R. Ir. 264, and not followed.

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I am therefore of opinion that the plaintiffs are entitled to judgment for the annuity and for arrears. The learned Judge has limited the arrears to the 1st July, 1898, and the respondents are content to accept arrears limited to that date. The appeal will therefore be dismissed with costs.

MOSS, J.A.:—The evidence sufficiently establishes that at the time of the testator's death and thereafter until the time of the trial of this action Thomas Anson Grange was a person so imbecile as to be in law of unsound mind and incapable of managing his affairs, and so subject to the control of the Court and the appointment of a committee of his person and estate, upon an application for that purpose.

The testator shews by his will that he considered Thomas incompetent to care for himself and as needing the care of a guardian although at the time of the making of the will he had attained the age of 21 years, and the evidence is that his condition remained the same until he was finally declared a lunatic and the plaintiffs, the Trusts and Guarantee Company, were appointed the committee of his person and estate.

That being the state of affairs the defendants are placed in this position: If, as I am inclined to think, the claim is one within sec. 23 of R.S.O. 1897 ch. 133, Thomas Anson Grange was never capable of giving a discharge for or release of it, and even if his mother, as natural guardian, might, under the terms of the will, receive payment and give a receipt therefor, yet the right of action was vested in Thomas, and the disability through incapacity prevented the bar of the statute. See Darby and Bosanquet, 2nd ed., p. 190; Pope on Lunacy, 2nd ed., p. 348.

On the other hand if the claim falls under secs. 4, 5, 6, and 43, as an annuity or periodical sum coming within the words of sub-sec. 3 of sec. 2, then the defence fails for the reasons pointed out by my brother Maclellan.

In either view the appeal fails and must be dismissed.

OSLER, and LISTER, JJ.A., concurred with MACLELLAN, J.A.

Appeal dismissed.

R. S. C.

[IN THE COURT OF APPEAL.]

RE TOWNSHIP OF METCALFE AND TOWNSHIPS OF ADELAIDE
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GOSFIELD NORTH.

June 14.

Costs—Scale of—Appeal from Judgment of Drainage Referee.

The costs of an appeal to the Court of Appeal from the decision of the Drainage Referee in a proceeding under the Drainage Act initiated before him should (if awarded to either party) be taxed on the scale applicable to appeals in cases begun in the High Court of Justice.
Decision of a Divisional Court, 19 P.R. 188, reversed.

APPEALS by the corporations of the townships of Adelaide and Warwick in the first matter, and by the corporation of the township of Colchester North in the second matter, from the orders of a Divisional Court allowing an appeal by the corporation of the township of Metcalfe from an order of Meredith, C.J., dismissing an appeal from the ruling of a taxing officer as to the scale upon which the costs of an appeal to the Court of Appeal from a decision of the Drainage Referee should be taxed, and allowing an appeal by the corporation of the township of Gosfield North from a like ruling. The Divisional Court held (19 P.R. 188) that the county courts tariff should be the basis of taxation of such costs.

The appeal was heard by OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., and LOUNT, J., on the 12th June, 1901.

T. Langton, K.C., and *C. A. Moss*, for the appellants.

J. Folinsbee and *H. E. Rose*, for the respondents.

June 14. The judgment of the Court was delivered by OSLER, J.A.:—The only question is, whether the costs of the appeals to this Court from the award of the Referee before whom the proceedings were initiated under the Drainage Act should be taxed on the scale of costs applicable to appeals from the county court to the High Court, or on the scale applicable to ordinary appeals from the High Court to this Court. In both cases the taxing officer taxed the costs on the latter scale. His

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taxation was affirmed by Meredith, C.J., on appeal in the *Adelaide* case. From his judgment an appeal was taken to the Divisional Court, to which Court an appeal from the taxation in the *Colchester* case was referred by the Judge before whom it came. In the result the judgment of Meredith, C.J., was reversed and the appeals from the taxing officer in both cases allowed. Leave to appeal was afterwards granted, and the appeals are now to be disposed of.

We intimated on the argument that it would probably be found that the point had already been decided by this Court in *Re Township of Dover and Township of Chatham*,* an appeal in a drainage case which originated, like the present, before the Referee. We find that judgment was delivered in that case on the 29th of June last, after a full argument, on the motion to settle the minutes, affirming the right of the successful party to tax his costs (where costs were adjudged) of the proceedings in appeal on the ordinary scale of costs in appeals from the High Court, and that, upon the true construction of the various sections of the Drainage Act, such costs were not taxable, as the costs of the proceedings before the Referee are taxable, on the county court scale. We had already laid that down as the rule where the appeal was from the report of the Drainage Referee in an action; *McCulloch v. Township of Caledonia* (1899), 19 P.R. 115: and it appeared to us, after the best consideration we were able to give to the question (undoubtedly one not free from difficulty), that the costs of an appeal from a report in a proceeding instituted before the Referee should be allowed and taxed in the same way.

We see no reason for receding from our former decision; and the appeals must, therefore, be allowed and the taxing officer's taxation affirmed with costs throughout.

T. T. R.

*Not reported.

[IN THE COURT OF APPEAL.]

WINTERBOTTOM V. LONDON POLICE COMMISSIONERS.

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June 20.

Police Commissioners—Constable—Negligence.

AN appeal by the plaintiff from the judgment of Robertson, J., reported 1 O.L.R. 549, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 11th of June, 1901, and on the 20th of June, 1901, was dismissed with costs.

I. F. Hellmuth, for the appellant.

T. G. Meredith, for the respondents.

R. S. C.

[IN THE COURT OF APPEAL.]

REX V. MARCOTT.

C. A.

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June 20.

Criminal Law—Fortune Telling—Criminal Code, sec. 396.

Deception is an essential element of the offence of “undertaking to tell fortunes” under sec. 396 of the Criminal Code, and to render a person liable to conviction for that offence there must be evidence upon which it may be reasonably found that the person charged was, in so undertaking, asserting or representing, with the intention that such assertion or representation should be believed, that he had the power to tell fortunes, with the intent in so asserting or representing of deluding and defrauding others.

In this case the evidence set out in this report was held to be sufficient.

Judgment of the chairman of the general sessions of the county of York affirmed.

APPEAL by the defendant upon the following case stated by His Honour Judge McDougall:

The prisoner was tried before me as chairman of the general sessions of the peace for the county of York and a jury on the 13th and 14th of December, A.D. 1900, and convicted upon an indictment charging that she the said Delina Marcott at the city of Toronto in the county of York, on the seventeenth day of October in the year of our Lord one thousand nine hundred, unlawfully did undertake to tell fortunes, contrary to the Criminal Code, sec. 396.

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The principal witnesses for the Crown were two young ladies, Kate Arksey and Jessie Bartlett, who went together to the house of the accused at number 122 McCaul street in the said city, where they swore that they made appointments with Mrs. Marcott to have an interview or "reading" on the 17th of October. They accordingly called together on the evening of the 17th of October when Mrs. Marcott had an interview with each of the witnesses separately, the other witness remaining downstairs in each case while the interview with Mrs. Marcott took place in an upstairs room. Miss Arksey swore that she had gone for the purpose of having her fortune told, and that in response to a question Mrs. Marcott had told her that she gave readings and answered questions. Miss Arksey asked her some questions concerning her health, and also as to whether she was going to get any money left her, and whether she was going to get married. In reply to the latter questions Mrs. Marcott told her that she was going to get a small sum of money but not very soon; that she was to be married and would be settled in about two weeks; that the man she was to marry was of medium size, not very dark and sharp featured. Miss Arksey paid Mrs. Marcott the sum of fifty cents. The latter told her if she came back in about two weeks' time she would give a "reading" in a trance which would cost a dollar.

The second witness, Miss Bartlett, swore that after waiting for Miss Arksey she (the witness) had gone upstairs when Mrs. Marcott told her to ask questions. The first question was as to whether the witness would go on a trip to the old country, to which Mrs. Marcott replied that she could see there were three trips for her, one within the space of three months, and the other within the space of three years, and that she was to cross deep water. She (Mrs. Marcott) said in answer to a question that she got her information from the spirit world. When questioned as to how long Miss Bartlett would live, the answer was to eighty or ninety years of age. In reply to a question as to whether the witness would get married and what her husband's employment would be, Mrs. Marcott said, "Aren't you married? I get with you that you are married." On the witness saying that she was not married at all, Mrs. Marcott continued, "I get with you two husbands," one a dark gentle-

man living in a south-west direction (from where they were) and with a very determined disposition. Mrs. Marcott further said that the witness would get money at two different times, and added that she found it difficult to answer the witness's questions because the witness was a very decided person, and because she had not come on the right day, her birthday happening on the 6th of the month. Mrs. Marcott said she ought to have come on the 24th, because she could not get the impressions with her. This witness also swore that she paid Mrs. Marcott fifty cents, getting change for a dollar bill. Mrs. Marcott said she would give her fuller readings if she came at another time when she would go to sleep. She could tell as far in the future as she could see and back as far in the past as she could see when she went to sleep, and that her powers came from the spirit world, but this reading would cost a dollar. It appeared that both women had been employed by the city police to ascertain if the prisoner was carrying on the business of fortune telling and if so to procure evidence of the fact; and were furnished with one Irwin, a member of the force, with the money with which to pay for the "readings."

At the conclusion of the case for the Crown it was urged by Mr. DuVernet, of counsel for the defence, that it was of the essence of the offence that the Crown should shew that there was fraud or deception or some false pretence, and that in the absence of any evidence of this the accused should not be convicted, it being contended that the word "pretend" in sec. 396 of the Code was intended to apply to all the matters specified in that section and that the same effect should be given to it as to the clause in the English statute under which it was only an offence where the act complained of was done "to deceive or impose on any of Her Majesty's subjects," following the judgment in *Monck v. Hilton* (1877), 2 Ex. D. 268.

On behalf of the Crown it was urged that the word "pretend" did not apply to the undertaking to tell fortunes, but that what was aimed at was the business of fortune telling, and that any person who undertook to foretell future events relating to the fortune and life of more than one individual came within the proper meaning of the section of the Code under which the indictment was laid.

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I overruled the objection and allowed the case to go to the jury who found the prisoner guilty, but at the request of counsel for the defence I have reserved the following question for the consideration of the Court of Appeal for Ontario :

Was I right in law in allowing the case to go to the jury upon the evidence for the Crown as above stated ?

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 3rd of June, 1901.

E. E. A. DuVernet, for the appellant.

J. R. Cartwright, K.C., for the Crown.

June 20. ARMOUR, C.J.O.:—The prisoner was convicted upon an indictment charging her with unlawfully undertaking to tell fortunes, contrary to the Criminal Code, sec. 396, and the question reserved by the chairman of the court of general sessions of the peace at which she was convicted was whether he was right in law in allowing the case to go to the jury upon the evidence for the Crown set out in the case.

Mr. DuVernet, for the prisoner, contended (1) that deception must be proved ; (2) that it must be deception by means of some kind of witchcraft, sorcery, enchantment, or conjuration ; (3) that there must be evidence of an undertaking, that is, proof either (a) of contract or (b) of deception.

The Imperial Act of Geo. II., ch. 5, after providing for the repeal of certain Acts therein named, and after enacting by sec. 3 that on and after the 24th day of June, 1735, no prosecution, suit or proceeding should be commenced or carried on against any person or persons for witchcraft, sorcery, enchantment or conjuration, or for charging another with any such offence in any court whatsoever in Great Britain, provided, by sec. 4, as follows: "And for the more effectual preventing and punishing any pretences to such arts or powers as are before mentioned whereby ignorant persons are frequently deluded and defrauded, be it further enacted by the authority aforesaid that if any person shall from and after the said 24th day of June pretend to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration or undertake to tell fortunes or pretend from his or her skill or knowledge in any occult or crafty

science to discover when or in what manner any goods or chattels supposed to have been stolen or lost may be found, every person so offending being thereof lawfully convicted on indictment or information in that part of Great Britain called England, or on an indictment or libel in that part of Great Britain called Scotland, shall for every such offence suffer imprisonment by the space of one whole year," etc.

This statute was held to be in force in this Province in *Regina v. Milford* (1890), 20 O.R. 306.

And sec. 396 of the Criminal Code is a transcript of the enactment contained in the section above quoted.

The word "undertakes," as used in this section of the Code, implies an assertion of the power to perform, and a person undertaking to tell fortunes impliedly asserts his power to tell fortunes and in doing so is asserting the possession of a power which he does not possess and is thereby practising deception, and when this assertion of power is used by him with the intent of deluding and defrauding others the offence aimed at by the enactment is complete.

The offence of undertaking to tell fortunes aimed at by this enactment does not in principle differ in my opinion from the offence of pretending or professing to tell fortunes aimed at by the Imperial Act 5 Geo. IV., ch. 83, which provides that "every person pretending or professing to tell fortunes or using any subtle craft, means, or device by palmistry or otherwise to deceive or impose on any of His Majesty's subjects shall be deemed a rogue and vagabond" and punished as the Act provides.

And in *Regina v. Entwistle*, [1899] 1 Q.B. 846, which was an application for a writ of certiorari to bring up and quash the conviction of Georgina Jones who was charged under this Act upon an information which alleged that she did pretend or profess to tell fortunes contrary to the form of the statute, and the objection was taken "that no intent to deceive or impose on any of Her Majesty's subjects was alleged in the information or in the conviction," Darling, J., in giving judgment, said: "In *Monck v. Hilton*, 2 Ex. D. 268, Cleasby, B., said: 'The clause includes all persons who pretend to tell fortunes (which imports that deception is practised by doing so).' I agree with that. I

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think that the use in the statute of the words 'pretending or professing to tell fortunes,' without resorting to that part of the statute which contains the words 'to deceive and impose on,' does import that deception is practised by doing so. In my opinion if a person were to say, 'I am not a real fortune teller; I cannot tell fortunes; what I am about to tell you must not deceive in any way, but I will pretend or profess to tell your fortune by the use of the ordinary means which people use to tell fortunes,' then no offence would be committed, because if an offence were charged, it would be a sufficient defence to prove that there was no intention to deceive, but that what was done was done simply as an amusement. But the words of the Act of Parliament are wide enough to cover intent to deceive, and I think they do import that deception was practised. I agree with the passage which I have cited from the judgment of Cleasby, B., whether what he said was *obiter dictum*, and unnecessary for the decision of the case then before the Court, or not. I think that what he said is good sense and good law, and I agree with it, whether it is binding on me or not."

And Channell, J., said: "I think that in order to render a person liable to conviction on such a charge as this the act must have been done in order to deceive and impose on some one; but this is so, not because the latter words 'to deceive and impose on' apply to the words 'pretending or professing to tell fortunes,' but because the intent is included in the words 'pretending or professing.' If there is not deceit there is not any pretending or professing. I think those words mean representing with the intention that the representation should be believed."

I am of the opinion that the words "undertakes to tell fortunes," equally with the words "pretending or professing to tell fortunes," import that deception is practised by doing so, and that the person undertaking to tell fortunes represents that he has the power to do so with the intention that such representation should be believed.

In the case therefore of a person charged with the offence of undertaking to tell fortunes under sec. 396 of the Code there must be evidence from which the jury may reasonably find that such person in so undertaking was asserting or representing,

with the intention that such assertion or representation should be believed, that he had the power to tell fortunes, with the intent in so asserting or representing of deluding and defrauding others.

And I am of the opinion, therefore, that the learned chairman was right in law in allowing the case to go to the jury upon the evidence for the Crown as above stated.

OSLER, J.A. :—We must construe sec. 396 of the Criminal Code as we find it there: "An appeal to earlier law and decisions for the purpose of interpreting the provisions of a statutory code can only be justified on some special ground, such as the doubtful import or previously acquired technical meaning of the language used therein": *Robinson v. Canadian Pacific R.W. Co.*, [1892] A.C. 481. One of the offences mentioned in the section is the pretending to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration; another (quite different from that) is the undertaking to tell fortunes; and a third, the pretending from skill and knowledge in any occult or crafty science to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found.

The defendant was convicted of the second of these offences.

That fraud, deception or false pretence of some kind is an essential element of the offence I am satisfied. Section 396 is the last clause of Part XXVIII. of the Code, which contains a group of sections under the title "Fraud," relating to and dealing with various phases of that offence. We have no right to read that word out of the section and to say that the business or practice of fortune telling is what is struck at dissociated from any attempt to deceive or defraud thereby.

Whether the learned Judge overruled the objection of the defendant's counsel as set forth in the case on the ground that there was some evidence of fraud, deception or false pretence, or on the ground that it was not necessary that such should be shewn, the case does not state. If on the latter ground I think he was wrong. We do not know how the jury were directed; we are only asked to say "whether he was right in law in allowing the case to go to the jury on the evidence for the Crown as stated."

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To "undertake" to tell fortunes, according to one of the common meanings of the word, is to assert or profess a power or ability to do so, which as Denman, J., says, in delivering the judgment of the Court in *Penny v. Hanson* (1887), 18 Q.B.D. 478, is something which no sane man can believe in these times, and where such profession, assertion, or undertaking is made for reward, or, as in the case just cited, with intent to deceive, the offence is complete, since the person so undertaking must know that he has no such power.

The case just cited was under a different statute from that from which sec. 396 of this Code is said to have been taken. The evidence was provided by a detective, but the Court said that the magistrate was right in convicting and that there was an intent to deceive on the part of the appellant in professing his ability, in the manner disclosed by the evidence, to tell the fortune of the detective. The case of *Regina v. Entwistle* (1899), 19 Cox C.C. 317, may be referred to.

In the case at bar there is evidence that the defendant undertook for reward to tell fortunes which she must have known that she had no power to do, and that was enough to send the case to the jury, even though the people whose fortunes she undertook to tell were the wretched women Arksey and Bartlett who were suborned by the policeman Irwin to entrap the accused into committing a breach of the law.

The question submitted must be answered in the affirmative.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

Appeal dismissed.

R. S. C.

[IN THE COURT OF APPEAL.]

KIRKPATRICK

V.

CORNWALL ELECTRIC STREET RAILWAY COMPANY (LIMITED).

BANK OF MONTREAL V. KIRKPATRICK.

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May 14.

*Street Railway—Mortgage—Future Acquired Property—Fixtures—Rolling Stock
—Execution—Company.*

An electric street railway company incorporated under the Ontario Joint Stock Companies Letters Patent Act, R.S.O. 1887 ch. 157, and subject to the provisions of the Street Railway Act, R.S.O. 1887 ch. 171, gave to trustees for holders of debentures of the company a mortgage upon the real estate of the company, together with all buildings, machinery, appliances, works and fixtures, etc., and also all rolling stock and all other machinery, appliances, works, and fixtures, etc., to be thereafter used in connection with the said works, etc. The by-laws of the directors and shareholders (who were the same persons and only five in number) authorizing the giving of the mortgage directed it to be given upon all the real estate, plant, franchises, and income of the company, and the debentures stated that they were secured by mortgage of the real estate, franchises, rolling stock, plant, etc., acquired or to be acquired :—

Held, that sec. 38 of R.S.O. 1887 ch. 157 does not restrict the power of mortgaging to the existing property of the company and that a company is invested with as large powers to mortgage its ordinary after acquired property as belong to a natural person ; that the mortgage in terms covered after acquired property, and even if not authorized in this respect upon a strict reading of the by-laws had been acquiesced in and ratified and was binding.

Judgment of a Divisional Court affirmed.

Held also, that the rolling stock, poles, wires, etc., formed an essential part of the corpus of what must be regarded as an entire machine, and were therefore fixtures and not seizable under execution to the prejudice of the mortgagees.

Judgment of Armour, C.J., affirmed.

THE first of these actions was brought for foreclosure of a mortgage given by an electric street railway, and the defendants, the mortgagors, and certain of their execution creditors, contended that after acquired property was not included in it. The second action was an interpleader issue between the execution creditors and the mortgagees, the chief question being whether the company's rolling stock was seizable under execution or was protected by the mortgage. The facts are stated in the judgments.

Appeals by the defendants from the judgment of a Divisional Court in the first action, and from the judgment of Armour, C.J., in the second action, were argued before OSLER, MACLENNAN,

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MOSS, and LISTER, JJ.A., and STREET, J., on the 28th of September, 1900.

Armour, Q.C., and R. A. Pringle, for the appellants.

Aylesworth, Q.C., and C. H. Cline, for the respondents.

May 14. The judgment of the Court was delivered by OSLER, J.A. :—

KIRKPATRICK V. CORNWALL ELECTRIC STREET RAILWAY CO.

This is an appeal by the defendants from the judgment of a Divisional Court affirming the judgment at the trial in a foreclosure action.

The principal defendants are an electric street railway company, incorporated by Letters Patent, dated the 26th March, 1896, under the Ontario Joint Stock Companies Letters Patent Act, R.S.O. 1887, ch. 157, subject to the provisions of the Street Railway Act, R.S.O. 1887, ch. 171.

The other defendants, the Bank of Montreal and C. B. Hosmer, are said to be shareholders in and also execution creditors of the company.

The plaintiffs are mortgagees of the company under a mortgage dated the 17th June, 1896, made to them as trustees for the holders of the bonds or debentures of the company.

The debentures were issued and the mortgage given under authority of a by-law passed by all the shareholders of the company at a meeting of shareholders held for that purpose on the 16th June, 1896, and of another by-law previously passed on the same day by all the directors of the company, providing for the issue of debentures of the company to the amount of \$100,000, payable in twenty years from the date thereof, to be secured by a first mortgage to be given by the company upon all their real estate, plant, franchises and income to the plaintiffs as trustees for the debenture holders for the purpose of securing repayment of the debentures with interest.

The directors of the company were five in number, and they were when the by-laws were passed and the debentures issued and the mortgage given, the only shareholders in the company.

The debentures, 100 in number and for \$1000 each, bear date the 20th July, 1896. Each debenture recites that all are

secured by the mortgage of the 17th June, 1896, given to the plaintiffs as trustees, and conveying to them by way of mortgage the real estate, franchises and railway of the company constructed or acquired, or thereafter to be constructed or acquired, and extensions thereof, its tolls and revenues, stations, shops, rolling stock and plant acquired or to be acquired by the company. The mortgage recites, *inter alia*, the directors' by-law and its sanction by the shareholders, and grants to the mortgagees several specified parcels of land in the town and township of Cornwall, together with (a) all buildings erected upon the firstly thereinbefore described mentioned (*sic*) lands and premises, and the engines, condensers, boilers, pumps, generators, pipings, beltings (rolling stock), and all other machinery, appliances, works and fixtures used and connected with the said works; and also (b) all the buildings, erections and fixtures upon the fourthly described lands and premises, together with all rails, rail-beds, ties, intersections, sidings, poles, span wires, insulators, and trolley wires owned by the mortgagors and laid down by them in and through certain streets in the said town and township of Cornwall and in and upon certain private properties connected with their said route of railway for the purpose of connecting said properties with their said route; and also (c) all engines, boilers, condensers, pumps, generators, pipings, beltings (rolling stock), and all other machinery, appliances, works and fixtures to be thereafter used in connection with the said works; and also (d) all rails, rail-beds, ties, intersections, sidings, poles, span-wires, insulators and trolley wires which might be thereafter placed or used in connection with the business of the mortgagors in and upon the thereinbefore described lands and premises or any part thereof, or in or upon any streets in the said town and township of Cornwall, and the appurtenances or any part thereof or in any wise connected or appertaining to the works on the premises aforesaid; and also all the right, title and interest of the said mortgagors of, in and to certain franchises granted by the municipal corporation of the town and township of Cornwall to W. R. Hitchcock, and now held by the said mortgagors, and all renewals and extensions of the said franchises which might thereafter be granted or extended.

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The franchises referred to are the licenses or grants of authority by the municipal corporations of the town and township, under the provisions of the Street Railway Act, to Hitchcock and his associates or any company formed by them to carry out the proposed undertaking to construct, maintain and operate a street railway along the streets of the municipalities.

Pending the action on the 31st January, 1899, possession of the mortgaged premises was delivered by the company to the debenture holders, the Sun Life Assurance Company, who are now in possession managing the railway.

After the argument in the Divisional Court of the motion against the judgment at the trial, a question arose as to the power of the Court to order foreclosure or sale of the property mortgaged by a street railway company, and on 30th April, 1900, this difficulty was removed by an Act of the Provincial Legislature, 63 Vict. ch. 32, sec. 1 of which provided that every mortgage made by any company incorporated under or subject to the provisions of the Electric Railway Act or of the Street Railway Act, whenever the deed creating such mortgage incumbrance might have been executed, might be enforced by judgment for foreclosure or sale in the same manner and to the same extent as such mortgage could be so enforced if the same had been made by a company not incorporated for any public purpose.

On the 16th May, 1900, judgment was given by the Divisional Court varying the judgment at the trial by striking out the order for payment of the mortgage money and directing foreclosure of the mortgaged premises in default of payment. The judgment contained special directions as to taking accounts, not necessary to be referred to here, and directed that the Bank of Montreal and C. R. Hosmer should be made parties defendants, they appearing by counsel and consenting thereto, and to be bound by the judgment pronounced at the trial as varied by the Divisional Court and by all the proceedings as if they had been made parties in the Master's office in an action for foreclosure, etc.

On the appeal it was objected: (1) That it should have been expressly declared by the judgment that the mortgage

only comprised and included such real and personal property of the company as was in existence at the time of its execution and of the passing of the by-law, and did not cover after acquired property.

(2) That the company had no power under the Acts to mortgage after acquired property, and even if they had, that the by-law under the authority of which the mortgage purported to be given did not authorize a mortgage thereof.

(3) That the by-law only authorized the company to mortgage its real estate and plant, franchise and income, and that there was no power thereunder to mortgage the rolling stock, which was no part of the plant.

(4) That there was no power to mortgage the franchise of the company.

There is, in my opinion, no foundation for this appeal, and the judgment should be affirmed for substantially the same reasons as those given by the learned Chief Justice of the Common Pleas Division.

I think we are not shut up to so narrow a construction of sec. 38 of R.S.O. 1887 ch. 157, as the defendants seek to place upon it. The powers conferred by the section are very wide: (1) The directors are authorized under the sanction of a by-law of the shareholders to borrow money upon the credit of the company (sub-sec. 1); and (2), under the like sanction, to hypothecate, mortgage, or pledge the real or personal property of the company to secure any sum or sums borrowed for the purposes thereof (sub-sec. 2).

To borrow for the purposes of the company and to mortgage the company's property to secure the lender are, therefore, *intra vires* the company, and there is nothing in the Act which expressly or by implication restricts the exercise of the power to its then existing property. In this respect it seems to me that the company is invested with as large powers to mortgage its ordinary after acquired property as belong to a natural person: Brice on *Ultra Vires*, 3rd ed., p. 238; *In re Dublin Drapery Company* (1884), 13 L.R. Ir. 174; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; *Philadelphia, etc., R.W. Co. v. Woelpper* (1870), 64 Pa. St. 366; *Anderson v. Butler's Wharf Company* (1879), 48 L.J. Ch. 824.

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The inconvenience of a different construction is forcibly pointed out in the judgments below, and it ought not to be adopted, unless the language of the section is such as to render it inevitable, as it is obvious that it would tend to hamper the operations of the company and prevent it from obtaining the necessary means for the construction and equipment of its works.

The terms of the mortgage, as well as of the debentures, if it were necessary to refer to the latter (see *Brown, Shipley & Co. v. Commissioners of Inland Revenue*, [1895] 2 Q.B. 598), in express terms include, future acquired property of the character described. In form, therefore, the instrument is unexceptionable. It is said, however, that it exceeds the powers conferred by the shareholders' by-law, and is therefore, to that extent, inoperative. I do not think that is a necessary consequence. If it were legitimate to regard the intention of the parties for the purpose of construing the instrument, it would be a fair inference from the facts proved, and particularly the fact that the contract for the construction and equipment of the road had only recently been made, that the future property was intended to be mortgaged. It was an essential part of the security offered to the intending purchasers of the debentures. The object of the loan was to enable the company to complete the road and to procure the rolling stock and other plant necessary to operate the railway, and the existing property of the company was a wholly insufficient security. These are facts which cannot be overlooked in determining the question of ratification or acquiescence. The mortgage being *intra vires* the company, it may be well supported on either of these grounds, even although the directors may have exceeded to some extent the limit of their own powers: *Phosphate of Lime Co. v. Green* (1871), L.R. 7 C.P. 43; Brice on *Ultra Vires*, 3rd ed., pp. 624-627.

There were but five shareholders who, as I have said, composed the entire directorate, and it is in my opinion clearly to be inferred not only that the mortgage was given with the actual assent of all and with a full knowledge of its terms, but

also that it was subsequently ratified and acquiesced in by the acts and conduct of the company and its shareholders.

It does not seem necessary to make any declaration in the judgment, as the defendants or some of them ask us to do, expressly restraining it to the property charged or specifying the property foreclosed. That, for the present, is sufficiently done by the terms of the judgment as entered.

It is said that the railway is, in part, constructed upon a parcel of land of which the company had only a lease for a term, and upon another parcel of land for which it had only an agreement for sale, which has been rescinded or in some other way put an end to.

These two parcels are not included in the mortgage, but they are not the subject of enquiry in this action. We cannot take cognizance of them or make any order in respect of them. No doubt those who intend to operate the road in the future will provide for their own interests therein.

We are of opinion that the judgment in the foreclosure action should be affirmed as entered and the appeal dismissed with costs.

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This was an interpleader issue between the execution creditors, defendants in the former case, and the trustees and debenture holders, the plaintiffs in that case. The execution creditors appeal from the judgment of Armour, C.J., in favour of the latter, setting up the same objections to the mortgage as those which have been dealt with in the judgment just delivered in the foreclosure suit, and the further objection that the property mortgaged, other than the land specifically described, is personal property liable to the executions not being covered by any duly registered chattel mortgage. As regards the poles, rails and wires of every description used by the company in operating its railway, whether they are erected or laid on or in the lands of the company or the streets of the municipalities, or in lands the title to which is no longer in the company, they form part of the land, and the land either not being exigible or else covered by the mortgage to the trustees, the rails, poles and wires thereon are equally exempt, not being severable therefrom

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for the purpose of the executions: *In re Toronto Railway Company Assessment* (1898), 25 A.R. 135; *Consumers Gas Co. v. Toronto* (1896), 23 A.R. 551; *S.C.* (1897), 27 S.C.R. 453.

The chief item in dispute under this head was the rolling stock of the company. The learned trial Judge held that it was an essential part of the railway, the latter being useless for any purpose without it, and therefore that it was real property covered as such by the mortgage.

The question whether the rolling stock of an ordinary steam railway company is to be regarded as personal property and liable as such to be taken in execution, has not, that I am aware of, been the subject of decision in the courts of this Province. In the courts of the United States the decisions are numerous and diverse, the weight of authority being rather in favour of the position that rolling stock is personal property: *Wood's Railway Law* (1889), vol. 2, sec. 290; vol. 3, sec. 466; *Redfield on Railways* (1888), vol. 2, p. 546 (n); *Hoyle v. Plattsburgh, etc., R.W. Co.* (1873), 54 N.Y. 314; *Neilson v. Iowa Eastern R.W. Co.* (1879), 51 Iowa 184; *Coe v. Columbus, etc., R.W. Co.* (1859), 10 Ohio St. 372.

In the province of Quebec "it is a well-established jurisprudence that the rolling stock of a railway is immovable property and part of the freehold," *per* Taschereau, J., in *Wallbridge v. Farwell* (1890), 18 S.C.R. at p. 20; *Grand Trunk Railway Company v. Eastern Townships Bank* (1865), 10 L.C. Jur. 11; the railway itself being an immovable, its rolling stock is immovable from destination.

In England it is now expressly provided by legislation that the rolling stock and plant used and provided by a railway company for the purpose of traffic on its railway is not liable to be taken in execution at law or in equity: 30 & 31 Vict. ch. 127, sec. 4; and see also 35 & 36 Vict. ch. 50, which protects hired rolling stock from distraint.

Shortly before the Act of 1867 was passed, the case of *Blackmore v. Yates* (1867), L.R. 2 Exch. 225, was decided. That was an interpleader issue between the mortgagee of rolling stock and an execution creditor of the railway company, who had seized it under his execution. No point was made as to the nature of the property. The only question seems to have

been whether the transfer of the whole of this rolling stock by the company to the plaintiff was not *ultra vires* and invalid. The Court, without pronouncing any opinion on the right of a railway to make such a transfer under all circumstances while the railway was in operation, held that, under the circumstances of the particular case, "they had the same right to give the rolling stock to the plaintiff, who, upon obtaining it, forewent the judgment he would otherwise have obtained (the mortgage having been given in compromise of an action), as the defendant would have had to take it in execution if it had been left untransferred on the company's line;" or, as Martin, B., put it: "As between these two creditors, the plaintiff had as good a right to the rolling stock as the defendant."

In *Yorkshire Railway Waggon Co. v. Maclure* (1882), 21 Ch. D. 309, a railway company having no power to borrow, yet needing money, sold their rolling stock to the plaintiff, and then took a lease of it for a term of years at a rent which in five years would repay the price and interest, when it was to be re-conveyed to them for a nominal sum. It was contended that this was in reality a mere mode of borrowing—a device to evade the Act—and further, that the company had no more power to sell the rolling stock, which was necessary for the carrying on of the undertaking, than to sell the railway itself. The Court of Appeal held the transaction to be in reality a sale. Jessel, M.R., said (p. 316): "Would it be against the terms of the Act of Parliament (*i.e.*, the Company's Act, which prohibited borrowing except in a particular way) for them to sell the rolling stock of the company? It does not appear to me to be so. Would it be reasonable to say that they could not sell the rolling stock? It does not appear to me that there is any analogy to the case of land. One never heard of a man who sold his furniture to pay his debts represented as borrowing money to pay them. It is paying the debts not by borrowing money but by disposing by way of sale of his chattels." See also Booth on Street Railway Law, sec. 422.

So far as any inference is to be drawn from what is said in the above cases and from the Imperial legislation, it is in favour of the view that, in the case, at all events, of an ordinary steam railway, rolling stock is personal property, and, as such, exigible

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in execution. There may be reasons founded on public policy why it should not be so in the case of railways for the construction or maintenance of which public moneys have been granted, and which may, therefore, be said to be public undertakings the efficient carrying on of which ought not to be interfered with by the seizure of their personal property necessary for that purpose, any more than by the seizure and sale of their lands and buildings: *Peto v. Welland R.W. Co.* (1862), 9 Gr. 455; *King v. Alford* (1885), 9 O.R. 643; *Jones on Railroad Securities*, sec. 158.

It is not, however, necessary at present to express an opinion as to the nature or character of the rolling stock of an ordinary railway. There are, no doubt, reasons of convenience why it should be held to be part of the freehold of the railway, or, at all events, not liable to be taken in execution, but such reasons alone would invite legislative action not judicial declaration. Reasons from analogy to the case of other articles which have been held to be fixtures are, indeed, not wanting in support of the view that the engines and cars of a railway ought to be so held as the learned Chief Justice below has forcibly pointed out, and these would seem to be the very reasons why, in the Province of Quebec, rolling stock is held to be part of the realty. I quote a passage from the judgment of Drummond, J., in *Grand Trunk Railway Company v. Eastern Townships Bank*, 10 L.C. Jur. 11, at p. 15: "The locomotive engine seized as a movable is in fact an integral part of the immovable property constituting the Grand Trunk Railway. It is to all intents and purposes part of the realty, *un immeuble par destination*, and is no more liable to seizure, apart from the immovable property to which it belongs, than the detached burrstones in a mill, the vats in a brewery, or the boilers in a sugar factory."

All the reasons which can be advanced in favour of treating rolling stock of an ordinary railway as part of the freehold apply with great force to the case of the electric railway, and there are others arising out of the peculiar character of a road of that description which appear to me to justify us in regarding it as *sui generis*, and relieve us from any embarrassment which might otherwise be caused by the cases which I have

referred to. While the rolling stock of the ordinary steam railway may be hauled by a locomotive resting by its own weight and generating its own power over the lines of many different companies, to none of which it belongs, and thousands of miles from its home, that of the electric railway really constitutes, as was argued, part of one great machine, confined to a particular locality, for which it is specially constructed and fitted; operated by means of a continuous current of electricity generated in part of the fixed plant in the power house, and passing through the trolley pole of the car, which is fitted to the overhead wire, through the car to the unbroken line of rails back to the generator. Of the entire machine thus operated, important parts, the rails and the power house, are unquestionable realty, and the rolling stock forms part of it in a much more intimate and connected manner than does the rolling stock of the steam railway. Detached from the rails it is incapable of use, and upon the principles laid down in *Place v. Fagg* (1829), 4 M. & Ry. 277; *Fisher v. Dixon* (1845), 12 Cl. & Fin. 312; and *Mather v. Fraser* (1856), 2 K. & J. 536, I am of opinion that, as regards its liability to be taken in execution, it may properly be regarded as part of the *corpus* of the entire machine, and therefore in the nature of a fixture, and passing with the land over which it runs.

The same considerations apply to the other parts of the property which have been held by the judgment to be the property of the mortgagees as against the execution creditors.

Upon the whole, therefore, I think the judgment should be affirmed, and the appeal dismissed with costs.

Appeals dismissed.

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D. C.

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May 9.

DONAHUE V. CAMPBELL.

Assessment and Taxes—Personal Property—Illegal Distress—R.S.O. 1897 ch. 224, sec. 135 a (1) 3.

Under sec. 135 a (1) 3 added to the Assessment Act, R.S.O. 1897 ch. 224, by 62 Vict. (2) ch. 27, sec. 11, goods which are not in the possession of the person assessed in respect to them cannot be distrained for the taxes assessed against them.

In this case the goods, which had been mortgaged, were when seized in possession of the bailiff of the mortgagee, who had taken possession upon default:—*Held*, that the plaintiff being a bailiff in possession, had a right to bring action for illegal distress.

THIS was an action brought against Lachlan Campbell and the corporation of the city of St. Thomas for illegal distress of goods in plaintiff's possession as bailiff, for taxes assessed against the same goods. The goods were the property of Herbert F. Service, and had been mortgaged on July 10th, 1900, to one Honsinger; and default having been made under the mortgage, Honsinger seized the goods early in August and put the plaintiff in possession as his bailiff. After this, and on August 21st, the defendant corporation distrained for taxes, through the defendant Campbell, bailiff of their collector.

The action was tried at St. Thomas by Hughes, Co.J., who dismissed it on the ground that the plaintiff, as bailiff, had no right to maintain the action, and that the goods, although not in the ownership or possession of the person assessed at the time of the seizure, came within the provisions of sec. 135 (1), 4 (b) of the Assessment Act, R.S.O. 1897 ch. 224, and were therefore liable to distress.

The plaintiff appealed to the Divisional Court, and the appeal was argued on May 9th, 1901, before MEREDITH, C.J.C.P., MACMAHON, and LOUNT, JJ.

J. Montgomery, for the appellant, argued that the plaintiff being a bailiff in possession, had a right to sue for trespass in regard to the goods in his possession: *Moore v. Robinson* (1831), 2 B. & Ad. 817; *Simpson v. The Great Western R.W. Co.* (1859), 17 U.C.R. 57; that R.S.O. 1897 ch. 224, sec. 135 (1), 4 (b), did not apply, the words "on the premises" limiting the

distress to cases where there were premises liable for taxes and goods found thereon; that here the premises were not liable, but only the goods, and the case was therefore entirely governed by sec. 135 *a* (1) 3, added to the Assessment Act by 62 Vict. (2), ch. 27, sec. 11 (O.), and providing for distress for taxes on personal property,* and the goods seized not being in the possession of the person assessed, were not distrainable for taxes.

W. B. Doherty, for the defendants, contended that sec. 135 of R.S.O. 1897 ch. 224, was broad enough to cover personalty as well as realty; and the personal property, wherever assessable, is assessable on the "premises" within the meaning of that section, and therefore the distress was legal. He also contended that the action should have been brought in the Division Court.

Per Curiam. The plaintiff being in possession and having the custody of the goods as bailiff was entitled to bring an action for their recovery, and the goods not being in the possession of the person assessed were not subject to distress for taxes. Appeal allowed with costs fixed at \$25. Judgment ordered to be entered for plaintiff for \$40, with Division Court costs, but without set-off to defendants.

A. H. F. L.

* This section provides that distress for taxes on personal property may be made, *inter alia* :—

3. Upon any goods and chattels in the possession of the person assessed where title to the same is claimed in any of the ways defined by sub-clauses *a*, *b*, *c* and *d* of sec. 135 (of R.S.O. 1897 ch. 224), and in applying said sub-clauses they shall be read with the words "owners of," and the words "on the premises" omitted therefrom.

Sub-clauses *a*, *b*, *c* and *d* of sec. 135 provide that distress may be made upon any goods or chattels on the premises where title to the same is claimed in any of the ways following:

- (a) By virtue of an execution against the owner or person assessed; or
- (b) By purchase, gift, transfer or assignment from the owner or person assessed, whether absolute or in trust, or by way of mortgage or otherwise; or
- (c) By the wife, husband, daughter, son, daughter-in-law or son-in-law of the owner or person assessed, or by any relative of his, in case such relative lives on the premises as a member of the family; or
- (d) Where the goods liable for the taxes have been exchanged between two persons by the one borrowing or hiring from the other for the purpose of defeating the claim of, or the right of distress for the non-payment of taxes.

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[IN CHAMBERS.]

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July 8.

HARGROVE V. ROYAL TEMPLARS OF TEMPERANCE.

Court of Appeal—Judgment—Certificate—Power to Stay Proceedings.

After the decision of the Court of Appeal has been certified by the Registrar, the case is no longer pending in that Court, and, by Rule 818, the subsequent proceedings are to be taken as if the decision had been given in the Court below.

A Judge of the Court of Appeal has, therefore, no power, under the Judicature Act, R.S.O. 1897 ch. 51, sec 54, or 60 & 61 Vict. ch. 34, sec. 1 (D.), or otherwise, after certificate, to make an order staying proceedings upon the judgment pending a proposed application for leave to appeal to the Supreme Court of Canada.

AN application by the defendants for an order staying proceedings under the judgment of the Court of Appeal pronounced on the 14th May, 1901, and now reported *ante* p. 79, until the defendants should have had an opportunity of applying either to the Court of Appeal or to the Supreme Court of Canada for leave to appeal to the last mentioned Court.

The application was made before Moss, J.A., in Chambers, on the 4th July, 1901.

Z. Gallagher, for the defendants.

H. H. Macrae, for the plaintiff.

July 8. Moss, J.A.:—At the trial the action was dismissed, but upon appeal the judgment was reversed and the plaintiff was awarded \$225 with costs. The certificate of the decision of this Court issued on the 24th June last, and the plaintiff has judgment for \$710.17 debt, interest, and costs below and in this Court, upon which he is now in a position to issue execution.

The defendants are desirous of appealing to the Supreme Court, and they say they intend to apply for leave at the earliest session of a Court competent to hear the motion. I am asked to stay proceedings on the judgment until the application can be made.

The first and—as it seems to me—insuperable difficulty which the applicants have to face on this application is the want of jurisdiction.

If the case was still pending in this Court, I could during vacation make an interim order to prevent prejudice to the claims of any parties pending the appeal: Ontario Judicature Act, sec. 54.* But the decision of this Court having been certified by the Registrar, the case is no longer pending here, and the subsequent proceedings are to be taken as if the decision had been given in the Court below: *Dueber Watch Case Mfg. Co. v. Taggart* (1899), 19 P.R. 233; Con. Rule 818.†

It is true that this Court may still hear an application for special leave to appeal to the Supreme Court, as provided by 60 & 61 Vict. ch. 34 (D.);‡ but I do not think the special jurisdiction to entertain such an application carries with it the power to interfere with the proceedings on the judgment in the meantime.

The case of *Adams v. Bank of Montreal* (1901), 31 S.C.R. 223, may be looked at as involving a similar question; also *Webber v. London and Brighton, etc., R.W. Co.* (1881), 51 L.J. Q.B. 154.

The motion must be refused with costs.

T. T. R.

* R.S.O. 1897 ch. 51, sec. 54: In any cause or matter pending before the Court of Appeal any direction incidental thereto, not involving the decision of the appeal, may be given by a single Judge of the Court of Appeal; and a single Judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal, as he may think fit; but every such order made by a single Judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof.

† 818. The decision of the Court of Appeal shall be certified by the Registrar to the officer of the High Court with whom the judgment or order appealed from was entered, who shall thereupon cause the same to be entered in the proper judgment or order book, and all subsequent proceedings may be taken thereupon, as if the decision had been given in the Court below.

‡ 1. No appeal shall lie to the Supreme Court of Canada from any judgment of the Court of Appeal for Ontario, except in the following cases:—

(e) In other cases where the special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last mentioned Court is granted.

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May 13.

Chattel Mortgage—Agreement for—Reading Agreement and Mortgage Together—Affidavit of Execution—Affidavit of Mortgagee—Validity—R.S.O. 1897 ch. 148, sec. 11.

Where an agreement to give a chattel mortgage is duly registered under R.S.O. 1897 ch. 148, sec. 11, and the mortgage subsequently given and registered, the Act does not operate to merge the former in the latter. The two may stand together for mutual support; and when the mortgage is grafted on the agreement and recites it, the whole contract in its inception and completion may be regarded as one transaction, and read as one instrument.

In this case the affidavits attached to the agreement were admitted to supply defects in those attached to the mortgage.

A chattel mortgage is not vitiated because the affidavit of execution makes a mistake in the name of one of the mortgagors, when it states the witness saw the mortgage executed by the parties thereto, and such executing parties are the proper parties.

Semble, a mortgagee who has taken his security upon paying off a prior mortgagee, not intending to do otherwise than take an assignment of the latter's securities, may fall back upon these should his own mortgage prove defective.

THIS was an interpleader issue which arose under the following circumstances:—

The firm of Benor & Co. borrowed \$2,500 from one Reynolds and gave him an agreement to give a chattel mortgage, which agreement was duly registered. The plaintiff in the present issue subsequently paid off Reynolds, and took a similar agreement from Benor & Co. in favour of himself. Some nine months afterwards and three days before execution was placed in the sheriff's hands by the defendant in the issue, a chattel mortgage was executed in favour of the plaintiff in fulfilment of the agreement; but it was contended that this mortgage was defective upon grounds sufficiently stated in the judgment. The issue was set down for trial before BOYD, C., at Barrie, on March 29th, 1901, but the trial was adjourned to Toronto, where it was tried on May 6th, 1901.

W. A. J. Bell, for the plaintiff.

G. C. Gibbons, K.C., and L. F. Stephens, for the defendant.

The following cases were cited on the argument besides those mentioned in the judgment: *Midland Loan and Savings Co. v. Cowieson* (1891), 20 O.R. 583; *MacIntyre v. Union*

Bank of Lower Canada (1885), 2 M.R. 305; *Joseph v. Lyons* (1884), 15 Q.B.D. 280; *Boldrick v. Ryan* (1890), 17 A.R. 253; *Kitching v. Hicks* (1883), 6 O.R. 739.

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May 13. BOYD, C.—This is an interpleader contest between execution creditor and chattel mortgagee. I found upon the facts absolute good faith and a *bonâ fide* advance on the part of the mortgagee. The ground of attack, as I understand, is mainly this that the registered agreement to give a mortgage under sec. 11 of the Act, R.S.O. 1897 ch. 148, having been implemented by the execution of a chattel mortgage in respect of the same debt and property, cannot be used to uphold the validity of the mortgage if the latter is in any part defective or insufficient under the requirements of the Act. The complaint is made here that this mortgage executed on January 23rd, 1901, is defective because the affidavit of the mortgagee does not contain words that the mortgagor was justly and truly indebted in \$2,500, and though it does say that \$2,500 is “justly due and owing,” it does not say to whom.

I do not read the Act as operating to merge the registered agreement for mortgage in the subsequently executed and registered mortgage. The two may well stand together in an honest transaction for the purpose of mutual support. When the latter instrument is grafted (so to speak) on the former and refers to and recites the agreement therein contained, the whole contract in its inception and completion may be regarded as one transaction and may be read as one instrument. That being so it sufficiently appears under oath of the mortgagee that the mortgagors are justly and truly indebted to him in the sum of \$2,500, for that is in the affidavit annexed to the registered agreement of date May 28th, 1900, and reading the affidavits together it appears very plainly that the sum of \$2,500 now justly due and owing (mentioned in the later affidavit) was so to the mortgagee.

I do not think the mortgage is vitiated because the affidavit of execution errs in calling one of the mortgagors Jemima Brewer instead of “Taylor:” the signature and execution is by the right mortgagors and the affidavit says that the witness saw it executed by the parties thereto. Besides there is no

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objection to the affidavit of execution of the registered agreement.

It was also objected that the security did not provide for the inclusion of future goods. But the agreement expressly is extended to the covering of "all goods to be purchased in the course of the business."

The objections altogether appear to be lacking in merit—technical at best—and the policy of the Court is to uphold as far as possible all honest securities unless compelled to do otherwise by statutory defects that are incurable.

Here I think all information regarding the agreement for the advance and the mortgage has been accurately disclosed and sworn to and placed on record in the registry office as required by law, so that ample notice was given to all the world of the dealings between mortgagor and mortgagee. Judgment should, therefore, be entered for the claimant with costs.

If it were necessary for the plaintiff to fall back upon the security held by Reynolds, I think there was the right to do so, as the plaintiff had no intention when paying off Reynolds to do otherwise than take an assignment of his securities: see *Trust and Loan Company v. Cuthbert* (1868), 14 Gr. 410; *Boldrick v. Ryan*, 17 A.R. 253; *Rogers v. Carroll* (1899), 30 O.R. 328; *Christin v. Christin* (1899), 37 C.L.J. 309; *Hope v. May* (1897), 24 A.R. 16 at p. 26.

A. H. F. L.

GRANT ET AL. V. SQUIRE ET AL.

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May 30.

Will — Construction — Devise — “Shelley’s Case” — Defeasible Fee — Executory Devise Over.

A testator, dying in 1833, devised land “to his son Alexander for life, and after his death to his heir-at-law should have any (*sic*); if not, to his brother John:”—

Held, that the gift to Alexander gave, by the operation of the rule in Shelley’s case, a fee simple or tail to him. “Heir” is *nomen collectivum* and carries the fee. But the last clause of the devise imported a defeasible estate in Alexander, and, as he left no “lawful heir” or “heir-at-law,” his fee tail or simple was defeated by the executory devise in fee simple in favour of John.

THIS action was instituted to recover possession of the westerly seventy acres of lot 43 on the north side of the River aux Raisins, in the township of Charlottenburgh, in the county of Glengarry.

The statement of claim alleged that, shortly before the 15th May, 1833, John Grant died in possession of and entitled to an estate of inheritance in fee simple in the lands in question, having first made his last will and testament whereby he devised the same to his wife for her natural life, with remainder to his son Alexander Grant, for the term of his natural life, with remainder to the heirs at law of Alexander, should he have any, but, if not, to John Grant, another son of the testator; that the testator intended to give the land to Alexander for life, and that the remainder to John should take effect if Alexander had no lawful issue; that the testator’s wife predeceased Alexander, and Alexander died on the 15th March, 1869, having never had any lawful issue; that on the death of Alexander, the testator’s other son, John, became entitled to and was seised of the land in fee simple; that this son John died on the 22nd May, 1870, seised in fee simple, having first made his last will and testament, bearing date the 27th November, 1867, whereby he devised this land to his brother Allan and Jennie, Allan’s wife, for their joint and several lives, and after the death of the survivor of them to his nephews Alexander Grant and John Dougald Grant, and their heirs and assigns forever; that Allan died in April, 1891, and his wife in September, 1900; that John Dougald died on the 25th December, 1893, intestate; that Allan

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was in possession of the land for many years, holding it until the death of the first named Alexander under a deed of conveyance from Alexander, dated the 16th November, 1853, and afterwards and up to the time of his, Allan's, death, he and his wife remained in possession under the will of the second named John.

This action was brought by Alexander Grant, the nephew of the second named John, and by the widow and heirs-at-law of John Dougald, alleging that on the death of Allan's wife they became entitled to possession.

The statement of defence alleged that the defendant David Squire claimed to be entitled to the possession of the land by virtue of a lease from his co-defendant; that the defendant Alexander H. Scott was entitled to possession as owner in fee; that John Grant, shortly before the 15th May, 1833, and at the time of his death, was the owner in fee simple in possession of the land; that, being so seised, he duly made his last will and testament, bearing date the 7th August, 1830, whereby he devised the land to his son Alexander in fee, subject to the life estate of his (the testator's) wife; that Alexander, being so seised, by deed bearing date the 16th November, 1853, granted and conveyed the land in fee to Allan Grant, who, by deed bearing date the 5th January, 1886, granted and conveyed the land in fee to Daniel John Scott, who, by deed bearing date the 13th September, 1897, granted and conveyed it to the defendant Alexander H. Scott; that Alexander Grant had a lawful heir-at-law, but that, in any event, by the true construction of the will of John Grant, bearing date the 7th August, 1830, he devised to Alexander in fee, and the other son, John, took no estate in and by such will; that Alexander Grant continued in possession of the land from the time of the death of the original testator in 1833 until the 16th November, 1853, when he conveyed to Allan, and Allan remained in possession from the 16th November, 1853, until the 5th January, 1886, when he conveyed to Daniel John Scott, and the latter remained in possession from the 5th January, 1886, until the 13th September, 1897, when he conveyed to the defendant Alexander H. Scott, who had been in possession ever since, by himself or his tenant, and had made lasting improvements, for which he claimed a lien in the event of the plaintiffs being found entitled.

The action was tried before BOYD, C., without a jury, at Cornwall, on the 7th May, 1901.

D. B. Maclellan, K.C., and *F. J. Maclellan*, for the plaintiffs.

James Leitch, K.C., and *R. A. Pringle*, for the defendants.

May 30. BOYD, C.:—There is only a memorial of the will made in 1833, and it is very meagre. The gift of the land “to his son Alexander for life and after his death to his *heir* at law should have any” (*sic*) gives, by the operation of the rule in Shelley’s case, a fee simple or tail to the son Alexander: *Dubber v. Trollope* (1734), Amb. 453, 457: “heir” is *nomen collectivum* and carries the fee.

But the last clause of the devise imports a defeasible estate in Alexander—“to his heir at law, should have any; if not, to his brother John Grant.” That is, as I read it, should the first taker, Alexander, die and have or leave no child, then the estate is to go over to his brother John. That has happened. If Alexander had a child, it was born out of wedlock, and could not take as “lawful heir” or “heir at law.”

Hence, the result is, that Alexander had a fee simple or fee tail liable to be determined and which has in the event been determined by the executory devise in fee simple to John Grant: *Mathews v. Gardiner* (1853), 17 Beav. 254.

The plaintiffs succeed in the action, but there should be a reference as to the defendant’s permanent improvements, to be lessened by occupation rent. Reserve further directions and costs.

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July 23.

Mortgage—Pretended Sale under Power—Fraud—Purchasers for Value without Notice—Knowledge of Agent—Interest to Conceal—Redemption—Compensation—Costs—Jurisdiction—Foreign Defendants.

R. purchased a mortgage of land from the mortgagee, and caused it to be assigned to his nominee, who, by R.'s direction, took proceedings under the power of sale and sold and conveyed to H., another nominee of R., who then induced three other persons to join him in a purchase of the land, at a large profit, concealing from them the fact that he was himself the real vendor. These co-purchasers paid three-fourths of the price at which the land was sold to them, and the land was conveyed to them and R. by H., and the conveyance registered, they not suspecting that the transaction was otherwise than as represented by R., and as on the face of the document it appeared to be.

In an action by the mortgagor to set aside the conveyances and for redemption, it was conceded that the sale to H. under the power was inoperative:—

Held, that the three associates of R. were purchasers for value without notice, and, having registered their conveyance, were not affected by the equity of the mortgagor to set aside the conveyance to H., nor by the knowledge which R. had of the mortgagor's rights, nor by the knowledge which their solicitor had, the same solicitor having acted for them who acted for R. in the proceedings taken under the power of sale; for R. had been guilty of a fraud upon the mortgagor, and he was committing a fraud upon his associates in the purchase by representing that a stranger was the vendor and that the price was more than four times as much as he had himself paid; and therefore notice to his associates could not be imputed of that which was within the knowledge of R. and the solicitor, and which it was their interest to conceal.

Cameron v. Hutchison (1869), 16 Gr. 526, applied.

Held, also, that R.'s associates were entitled to costs against R.

Faulds v. Harper (1886), 11 S.C.R. 639, followed.

Held, also, that, as an undivided one-fourth of the mortgaged premises remained vested in R., the plaintiffs were, as to him, entitled to redeem; and if on redemption he should not be in a position to re-convey the other undivided three-quarters, he must make compensation to them for the value of it.

Held, lastly, that there was jurisdiction in the Court, notwithstanding that R. and his two nominees were foreigners, not domiciled nor resident in Ontario, to award judgment against them, not only for redemption, but also for costs and damages or compensation, the compensation being incidental to the redemption, R. having by appearing attorned to the jurisdiction, and the case moreover falling within clauses (b), (d), (e), and (f) of Rule 162 (1), relating to service of writs out of the jurisdiction.

AN action to set aside certain assignments and conveyances and for redemption of mortgaged premises. The facts are stated in the judgment.

The action was tried before MEREDITH, C.J.C.P., without a jury, at Sandwich, on the 18th and 19th June, 1901.

J. L. Murphy (J. E. O'Connor, with him), for the plaintiffs.

W. R. Riddell, K.C., for the defendant Roberts.

E. S. Wigle, for the defendants Hunt and Dresskell.

J. H. Rodd, for the other defendants.

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July 23. MEREDITH, C.J.:—The plaintiff W. B. Smith was the owner of the land in question, subject to a mortgage which he had given upon it to John Curry and Francis Cleary, which they had assigned to the London and Canadian Loan and Agency Company, Limited, who were the owners of it at the time when the defendant Roberts purchased the mortgage from them for the amount that remained then due upon it.

The plaintiff W. G. Smith is the lessee of the mortgaged premises, and derived his title after the mortgage, from the mortgagor.

The London and Canadian Company, by direction of the defendant Roberts, on the 10th January, 1900, assigned their mortgage to the defendant Frederick S. Dresskell, who was a mere nominee of Roberts, and never had any beneficial interest in it.

By the direction of Roberts, proceedings were taken in the name of Dresskell to sell the mortgaged premises under the power of sale contained in the mortgage.

As the result of these proceedings the lands were offered for sale by public auction on the 7th April, 1900, when they were knocked down to the defendant Hunt as the purchaser at the price of \$1,250. Hunt was not a real purchaser, but a mere nominee of Roberts, on whose behalf he bid the property in.

Dresskell, in pursuance of this pretended sale, on the 11th April, 1900, executed a conveyance of the lands to Hunt, purporting to convey them under the power of sale in the mortgage, but Hunt was, as I have said, a mere nominee of Roberts, and took the conveyance in that capacity, never having intended to have any beneficial interest in the property.

Having in this way apparently got rid of the rights of the plaintiffs in the property, Roberts set about disposing of it, and in the result succeeded in getting the defendants Prentiss, Van Gorder, and Woodworth to agree to join him in the purchase of it.

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He at first told them that he thought he could secure the property for them and himself for \$6,000 or \$6,200 from the owner, who, he said, was Hunt—at least the name was mentioned to some of them—and they authorized him to buy it, if it could be got for \$6,000. On a subsequent occasion Roberts informed them that the property could be got for \$5,800, and they then authorized him to complete the purchase at that price. Each of them contributed his share of the \$5,800, which was paid when the deed was sent to a bank in Cleveland, where the parties resided. The deed was from Hunt and his wife, who joined to bar dower, to the four parties, and the consideration expressed in it is \$5,800.

Roberts kept concealed from the other purchasers the fact that Hunt was a mere trustee for him, and they entered into the transaction believing that Roberts, like themselves, was not interested in the property except as a purchaser with them from Hunt, and that he was contributing an equal share with them of the purchase money, and they completed the transaction and paid their purchase money believing that Hunt was the real vendor and that he had contracted with Roberts acting for them and himself for the sale of the property to the four of them for \$5,800.

The conveyance from Hunt is dated the 27th July, 1900, and was registered on the 30th of the same month.

It was attempted to be shewn by the plaintiffs that Roberts was acting for these three defendants in the purchase of the mortgage, and that all that was done by Roberts was, or must be deemed to have been, done on their behalf as well as his own, but the attempt entirely failed, and my clear conclusion upon the evidence is, that these three defendants had no connection with the property or with Roberts as to it until after the deed to Hunt was made, when Roberts began his negotiations with them, and that these three defendants had not the slightest suspicion that the transaction they were entering into was not what Roberts represented it was, and what on the face of the documents it appeared to be.

It was at once, upon the case being opened, conceded by counsel for the defendants that the pretended sale to Hunt under the power of sale was wholly inoperative, and that Hunt,

after the conveyance, held the mortgaged premises subject to the right of the plaintiffs to redeem as it existed before the pretended sale; but they claimed for the purchasers from Hunt the rights of purchasers for value without notice and the protection afforded by the Registry Act.

The defendants Prentiss, Van Gorder, and Woodworth, being, as I have found them to be, purchasers for value without notice, and having registered their conveyance, are not affected by the equity of the plaintiffs to set aside the conveyance to Hunt, and the action must as to them be dismissed.

It was argued by Mr. Murphy that, having authorized Roberts to act for them as well as himself in the purchase, they were affected by the knowledge which he of course had of the plaintiffs' rights, and that, at all events, they were affected by the knowledge which the solicitor had, the same solicitor having acted for them as acted for Roberts in the proceedings taken under the power of sale, but neither position is, I think, tenable.

Roberts had been guilty of a fraud upon the mortgagor, and he was committing a fraud upon his associates in the purchase by representing that a stranger was the vendor and the price paid was \$5,800, when he was himself the vendor and the property had cost him considerably less than a quarter of that sum.

The principle of the case of *Cameron v. Hutchison* (1869), 16 Gr. 526, and the cases referred to in it, applies, and I am not justified in imputing notice to his associates of that which was within the knowledge of Roberts and which it was his interest to conceal from them.

As the Vice-Chancellor points out in *Cameron v. Hutchinson*, at p. 532, in the case of a solicitor or agent the doctrine of notice to the principal proceeds upon the presumption that the knowledge will be communicated, because it is the duty of the solicitor or agent to communicate it; but that presumption is rebutted where motives exist in the mind of the solicitor or agent sufficient with ordinary men to withhold information—confining, however, this statement of the law to the case of knowledge existing in the agent or solicitor, and excluding from it the case of notice expressly given to one who is agent to receive that notice.

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For the same reason the solicitor's knowledge is not to be deemed notice to these three defendants, for he was aware of the fraud upon the power attempted to be perpetrated by Roberts, and advised and conducted as Roberts's solicitor the proceedings designed to enable Roberts to carry out his purpose.

Faulds v. Harper (1886), 11 S.C.R. 639, is an authority, if any be needed, that the defendants with whose case I am dealing are entitled to set up the defence that they are *bonâ fide* purchasers for value without notice against the plaintiffs' claim to set aside the pretended sale and conveyance to the defendant Hunt. These defendants are entitled to their costs, and the proper order as to them will be that the defendant Roberts pay them: *Faulds v. Harper*, at p. 657.

One undivided quarter of the mortgaged premises still remains vested in Roberts, and the plaintiffs are, as to him, entitled to redeem. If on redemption he is not in a position to reconvey the other undivided three-quarters, he must, I think, make compensation to them for the value of it. I have not been able to find any precedent for such a redemption judgment, and was not referred to any by counsel, but on principle I see no reason why on the facts of this case such a judgment may not be pronounced or why it ought not to be in order to do justice between the parties. The principle upon which such a judgment is based does not differ from that which is applied where a mortgagee on redemption is unable to return the title deeds of the mortgaged property, which is, that he must indemnify the mortgagor against the loss which he sustains by reason of the mortgagee not being in position to return them to him. See *James v. Rumsey* (1879), 11 Ch. D. 398.

The judgment which I intend to pronounce finds some support in what was said by Vice-Chancellor Mowat in *Trust and Loan Co. v. Boulton* (1871), 18 Gr. 234, at p. 236: speaking of the case of a mortgagee who, with notice of a second mortgage, had released to the mortgagor for a nominal consideration part of the mortgaged premises, he says that the mortgagee may have been responsible to the second mortgagee for the fair value of the parcels conveyed.

It is more than probable that Roberts cannot put himself in a position to reconvey the undivided three-quarters not now

vested in him, and I should, therefore, I think, as the evidence on that point was gone into fully, find the value of that interest for the purpose of determining the amount with which Roberts is chargeable.

\$6,500 is, I think, upon the evidence, a fair sum at which to place the value of the mortgaged premises, and on that basis \$4,875 is the sum with which Roberts is chargeable.

There will, therefore, be judgment for the reconveyance by the defendant Roberts to the plaintiffs, according to their respective estates and interests therein, of the undivided quarter of the mortgaged premises now vested in him, and for payment by him to the plaintiffs of \$4,875, less whatever is found to be due on the mortgage for principal and interest, and if the parties cannot agree upon the amount so due, there may be a reference to the local Master at Windsor to ascertain it.

If the defendant Roberts shall put himself in a position to reconvey the whole of the mortgaged premises, the plaintiffs are to be entitled to the usual redemption judgment.

The defendants Roberts, Dresskell, and Hunt must pay the plaintiffs' costs up to and including the entry of judgment, and the subsequent costs will be reserved to be dealt with by a Judge in Chambers.

If the defendant Roberts shall put himself in a position to reconvey some but not all of the interests in the mortgaged premises not now vested in him, any of the parties interested are to be at liberty to apply for such variation of the judgment as may be necessary to be made to meet the altered circumstances of the case.

I have thus far not dealt with an objection as to the jurisdiction of the Court raised by counsel for the defendants.

I do not understand that it is contended that there is no jurisdiction to pronounce against the defendants a judgment for redemption, but it is objected that there is no jurisdiction in the Court to inflict costs on the defendants Dresskell and Hunt or to award to the plaintiff damages for or compensation in respect of the wrongful sale and consequent breach of trust of the defendant Roberts in so dealing with the mortgaged premises as to deprive the plaintiffs of their right on redemption to a reconveyance of the interests in the mortgaged

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premises which have become vested in the defendants Prentiss, Van Gorder, and Woodworth.

The ground upon which this contention is based is the fact that the defendants on whose behalf it is raised are foreigners not domiciled or resident in Ontario. The contention is not, in my opinion, well founded, for several reasons. The judgment which I pronounce against the defendant Roberts is a judgment for redemption, and the direction as to his indemnifying the plaintiffs is incidental to the redemption. The plaintiffs claim redemption, and Roberts by appearing has attorned to the jurisdiction, at all events to the extent of the relief specifically claimed, but I think as well to give jurisdiction to the Court to pronounce any judgment which the plaintiffs on the pleadings and evidence have the right to ask for under their claim for further and other relief. And, lastly, the case is within clauses (b), (d), (e), and (f) of sub-sec. 1 of Con. Rule 162.

As to the defendants Dresskell and Hunt, the case comes, I think, within the clauses of the Con. Rule to which I have referred.

Mr. Murphy also raised a question which I have not yet dealt with: that the assignment of the mortgage to Dresskell was void because, as he contended, it was shewn to have been executed with a blank for the name and description of the assignee, which was filled in after the deed had been executed, and there had been no subsequent re-execution by the assignors. The evidence does not, however, warrant such a conclusion of fact, for, though the name and description of the assignee were inserted after the seal of the assignors had been affixed to the assignment, that was done before it had become a completed instrument by an agent of the assignors authorized to complete the instrument and to deliver it after the name and description of the assignee had been filled in, and who did so. The objection, therefore, is not sustained.

E. B. B.

[IN CHAMBERS.]

SYRACUSE SMELTING WORKS V. STEVENS ET AL.

1901

July 17.

Costs—Security for—Several Defendants—Præcipe Orders—Practice.

One of the defendants having obtained on præcipe an order for security for costs, the plaintiffs complied with it by paying \$200 into Court, after which another defendant, without notice of the previous order or of the payment into Court thereunder, obtained an order on præcipe for security for costs on his own behalf :—

Held, that the plaintiffs were entitled to obtain an order providing that the security given by them should stand as security for the costs of all the defendants, but were not entitled to have the second order for security set aside as irregular.

THE plaintiffs residing in the Province of Quebec, the defendant Labatt obtained an order requiring them to give security for costs on his behalf, and they complied with the order by paying \$200 into Court. Thereafter the defendant Fallows obtained a similar order, without notice of the previous order or of the payment into Court. The plaintiffs thereupon moved to set aside the order of the defendant Fallows as irregular. The Master in Chambers refused to set the order aside, but made an order allowing the security given by the plaintiffs to stand for the benefit of all the defendants, with liberty to them to move for increased security, if so advised, and made the costs of the application and order costs in the cause.

The plaintiffs appealed, and their appeal was heard by MEREDITH, C.J.C.P., in Chambers, on the 20th May, 1901.

W. E. Middleton, for the appellants.

J. H. Moss, for the defendant Fallows.

July 17. MEREDITH, C.J. :—This is a motion by the plaintiffs by way of appeal from an order of the Master in Chambers dated the 18th May, 1901, in so far as it dismissed their motion to set aside and vacate the præcipe order for security for costs issued and served by the respondent.

Labatt, one of the defendants in the action, obtained on præcipe an order for security for costs, and it is to be assumed I think that, having been issued by the officer by whom the

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order in question was issued, it was in the same form as the latter order, viz., that the security should be on behalf of the defendant Labatt, the defendant obtaining the order. That assumption may, I think, properly be made, because, though I offered Mr. Middleton an opportunity of shewing the contrary, he did not avail himself of it.

The plaintiffs paid into Court \$200 pursuant to Con. Rule 1207; and, as it was paid in as a compliance with the terms of the order, it must, I think, be taken to have been paid as security on the defendant Labatt's behalf.

The order in question was taken out by the respondent's solicitor without notice of the order which had been obtained by Labatt or of the payment into Court thereunder.

As I understand the ruling of the Master in Chambers, it was that, though the appellants were entitled to obtain an order that the security given by them under the order taken out by the defendant Labatt should stand as security for the costs of all of the defendants, until such an order was obtained the order in question stood and operated to stay the proceedings in the action.

I concur in that view, and think that the practice laid down is a convenient one.

It was not, I think, reasonable that the prior order having provided that the security should be for the costs of the defendant obtaining it, and the appellants having acquiesced in the form in which the order was drawn by paying in their money in compliance with it, the respondent should be put in the position of being prevented from obtaining an order on his own behalf and running the risk of a contest with his co-defendant, in the event of the defendants succeeding in the action and being awarded costs, as to whether the money in Court stood as security for the costs of all of the defendants or for the costs of the defendant Labatt only.

The appeal is dismissed with costs to the respondent in any event of the action.

T. T. R.

RE ABBOTT-MITCHELL IRON AND STEEL CO. (LIMITED).

1901

July 18.

Company—Winding-up—Petition for Order—Previous Demand—Service of Writ of Summons—Notice of Application.

Service of the specially indorsed writ of summons in an action against the company to recover the amount of a creditor's claim is not a sufficient demand in writing, within the meaning of sec. 6 of the Winding-up Act, R.S.C. 1886 ch. 129, to serve as the foundation for a petition by the creditor for a winding-up order.

Semble, that, as sec. 8 of the Act requires the petitioner to give four days' notice of his application, effect could not be given to a ground of which the company had not that notice.

A PETITION by creditors of the company for a winding-up order. The facts appear in the judgment.

The petition was heard by MEREDITH, C.J.C.P., in the Weekly Court, on the 23rd May, 1901.

D. W. Saunders, for the petitioners.

D. E. Thomson, K.C., for the respondent company.

July 18. MEREDITH, C.J.:—I held* on the first argument that the case of the petitioners was not made out, but gave them leave to amend by setting up a demand in writing of payment and the neglect for sixty days to comply with the demand; and the petition, having been amended accordingly, came on again to be heard on the 23rd May last, when counsel for the petitioners contended that the service which had been effected on the respondent company of a specially indorsed writ in an action against it to recover the amount of the petitioners' claim was a sufficient demand in writing within the meaning of the Winding-up Act, R.S.C. 1886 ch. 129, sec. 6.*

Mr. Thomson, for the respondents, contended that it was not, and further argued that the case was not one in which a

* A company is deemed to be unable to pay its debts as they become due, whenever a creditor to whom the company is indebted in a sum exceeding two hundred dollars then due, has served on the company, in the manner in which process may legally be served on it in the place where service is made, a demand in writing, requiring the company to pay the sum so due, and the company has, for ninety days, in the case of a bank, and for sixty days in all other cases, next succeeding the service of the demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor.

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winding-up order should be made, because, as he contended, there remained practically nothing to be wound up.

Contrary to the impression I had on the argument, I have come to the conclusion that the service of the writ was not a sufficient demand in writing requiring the respondent company to pay the amount due to the petitioners, within the meaning of sec. 6. The writ is issued from the High Court in the name of the Sovereign, and requires the person summoned to enter an appearance within ten days, and informs him that in default of appearance judgment may be signed. The indorsement gives the particulars of the claim, and contains a notification of the amount of the plaintiffs' claim for debt and costs and that if the amount be paid within eight days proceedings will be stayed.

What the statute requires to be served is a demand in writing requiring the company to pay the sum due—that is, as I understand the language of sec. 6, to pay it at once. Now, there is nothing of this nature in the writ or the indorsement upon it. There is in terms no such demand in writing, but only a notice of the effect of payment within eight days, and the claim is, having regard to the nature of the proceeding, not, I think, in the nature of a demand in writing requiring payment to be made, but a claim for the purposes of the action and to be worked out in it.

It is but reasonable, where what is practically the bankruptcy of the company is to follow the failure to comply with the demand served, or may do so, that the demand should be reasonably certain in terms and at all events not calculated to mislead, and I think that to treat the service of a specially indorsed writ as a sufficient demand in writing, would be to sanction what would be calculated to mislead.

There is a further objection to giving effect to this as a ground for making the winding-up order. By sec. 8 of the Act the petitioning creditor must give four days' notice of his application to the company before applying by petition for the order, and it would, I think, be against the spirit as well as the letter of the Act, if effect were given to a ground of which the company had not that notice and which was not put forward in the petition notice of which was served upon it.

Upon the whole, therefore, I conclude that the application should be refused, and I therefore dismiss the petition without costs.

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RE ABBOTT-
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[DIVISIONAL COURT.]

RE GEDDES AND COCHRANE.

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July 22.

Courts—Divisional Court—Single Judge—Proper Forum—Special Case—Arbitration Act—“Opinion”—“Final Decision”—Judicature Act, sec. 67, sub-sec. 1 (a)—Rule 117.

A single Judge has no jurisdiction to pronounce the opinion of the Court upon a special case stated by arbitrators pursuant to sec. 41 of the Arbitration Act, R.S.O. 1897 ch. 62. The effect of cl. (a) of sub-sec. 1 of sec. 67 of the Judicature Act, R.S.O. 1897 ch. 51, and of Rule 117, is to require that such a case be heard before a Divisional Court, as being a proceeding directed by statute to be taken before the Court, and in which the decision of the Court is final. “The opinion of the Court” is a “decision,” though not a binding adjudication as to the rights of parties or a decision amounting to a judgment or order; it is a “final decision” because it is the end of the proceeding and cannot be reviewed by an appellate Court.

MOTION by Cochrane, one of the parties to a reference to arbitration, to strike out of the list of cases set down for hearing by a Divisional Court, a special case stated by arbitrators for the opinion of the Court pursuant to sec. 41 * of the Arbitration Act, R.S.O. 1897 ch. 62, upon the ground that the case had already been set down before a Judge in the Weekly Court, who had given his opinion upon the special case. [*Re Geddes and Cochrane*, Rose, J., 2nd November, 1900, heard at the same time as *Re Geddes and Garde*, 32 O.R. 262.]

The motion was heard by a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and LOUNT, JJ., on the 11th June, 1901.

John MacGregor, for Cochrane.

H. D. Gamble, for Geddes.

* 41. Any . . . arbitrator . . . may at any stage of the proceedings under a reference . . . state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

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July 22. MEREDITH, C.J.:—The question for decision is as to the jurisdiction of a Judge in the Weekly Court to pronounce the opinion of the Court upon a special case stated for the opinion of the Court pursuant to sec. 41 of the Arbitration Act.

The contention of Mr. Gamble, by whom the case has been set down to be heard before the Divisional Court, is, that the effect of clause (a) of sub-sec. (1) of sec. 67 † of the Judicature Act, R.S.O. 1897 ch. 51, and Con. Rule 117, ‡ is to require that it be heard before a Divisional Court as being a proceeding directed by statute to be taken before the Court, and in which the decision of the Court is final.

There is no doubt that the decision of the Court upon the special case is final in the sense that it is an end of the proceeding, and that there is no appeal from it. That is settled by the cases of *In re Knight and Tabernacle Permanent Building Society*, [1892] 2 Q.B. 613, and *In re Kirkleatham Local Board and Stockton and Middlesborough Water Board*, [1893] 1 Q.B. 375. Since these cases were decided an amendment to the English Judicature Act has been passed by which an appeal is expressly given. That legislation has not, however, been adopted in this Province.

Mr. MacGregor strenuously urged that the decision is not a final one within the meaning of the provisions of the Judicature Act and Con. Rule to which I have referred, and indeed that it is not a “decision” at all, and, *a fortiori*, not a final decision, and for that proposition he relied upon the language used by the Judges of the Court of Appeal in *In re Knight and Tabernacle Permanent Building Society*. That language is, however, to be read in the light of the question with which the Court was dealing, viz., the right to appeal from the decision of the Court on the special case. As Lord Esher puts it (p. 617): “It appears to me that what the statute in terms provides for is “an opinion” of the Court to be given to the arbitrator or umpire; and that there is not to be

† 67.—(1) Subject to Rules of Court, the following proceedings and matters shall be heard and determined before a Divisional Court of the High Court :

(a) Proceedings directed by any statute to be taken before the Court in which the decision of the Court is final.

‡ Similar in its terms to the statute.

any determination or decision which amounts to a judgment or order." So Lord Justice Bowen says (p. 619): "It appears to me that this consultative jurisdiction of the Court does not result in a decision which is equivalent to a judgment or order." And Lord Justice Kay, at p. 621, says: "I think that it is impossible, looking to the language of the Arbitration Act, to say that the opinion given on the special case stated under sec. 19 is a judgment or order."

Had the Court been of opinion that the opinion pronounced by the Court was a judgment or order of the Court, an appeal lay from it, and all that was decided was that it was not a decision amounting to a judgment or order so as to be appealable.

Is, then, the pronouncing by the Court of its opinion on the special case submitted within the provisions of the Judicature Act and Rule on which Mr. Gamble relies?

That it is a proceeding directed by statute to be taken before the Court, does not appear to admit of doubt; that it is a decision, though not a binding adjudication as to the rights of parties, or a decision amounting to a judgment or order, appears to me to be reasonably clear; and if it be a decision of the Court, that it is a final decision, would seem to follow, because it is the end of the proceeding, and cannot be reviewed by an appellate Court.

The policy of the Judicature Act no doubt was, as sec. 65 provides, that as a general rule every action or proceeding in the High Court should be heard, determined, and disposed of before a single Judge, because there was an appeal from him either to a Divisional Court or to the Court of Appeal.

The exceptions contained in clause (a) of the 1st sub-section of sec. 67 seem to have been provided for because it was thought that where there was no appeal from the decision of the Court, it was more satisfactory to have the proceeding taken before a Court composed of three Judges than a Court composed of but a single Judge. It is, I think, expedient that, so long as no appeal is given from the decision of the special case, it should be heard before a Divisional Court rather than before a single Judge, and it is satisfactory to me that we are enabled to arrive at the conclusion that the proper tribunal for the hearing of such cases is the Divisional Court.

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I am fortified in my conclusion by the fact that in England, where the legislation, as far as it affects the matters in question on this motion, is identical with our own, the uniform practice, as far as the reported cases shew, is, that these special cases are heard before a Divisional Court, and it will be noticed that Lord Esher in *In re Knight and Tabernacle Permanent Building Society*, [1891] 2 Q.B. 63, at p. 68, speaking of the power of a Judge to order a case to be stated, refers to it as the stating of a case for the decision of a Divisional Court.

The motion must, in my opinion, be dismissed, but, in the circumstances of the case, it will be dismissed without costs.

MACMAHON and LOUNT, JJ., concurred.

T. T. R.

[DIVISIONAL COURT.]

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May 20.

May 27.

July 20.

TAYLOR V. GRAND TRUNK R.W. Co.

Particulars—Defence—“Not Guilty by Statute.”

A railway company cannot be required to give particulars of the defence of “not guilty by statute.” The right to plead such a defence being expressly preserved by Rule 286, the application of Rule 299 is excluded.
Jennings v. Grand Trunk R. W. Co. (1880), 11 P.R. 300, overruled.

AN application by the plaintiff for an order requiring the defendants to give particulars of the defence of “not guilty by statute” set up with other defences in their statement of defence.

The application was heard by Mr. Winchester, the Master in Chambers, on the 14th May, 1901.

J. R. Code, for the plaintiff.

D. L. McCarthy, for the defendants.

MAY 20. THE MASTER IN CHAMBERS:—This is an action brought by the plaintiff against the defendants for damages for forcibly removing him from one of their trains. In their statement of defence the defendants plead “not guilty by statute,”

referring to 16 Vict. ch. 37, sec. 2; also the Railway Act, 51 Vict. ch. 29, sec. 287 (D.)—both public Acts; they also set up other defences. The plaintiff asks for particulars of the plea of “not guilty by statute,” and refers to *Jennings v. Grand Trunk R.W. Co.* (1880), 11 P.R. 300, in support of his application. The defendants oppose the motion on the ground that they are entitled to plead both statutes and to rely on same as a defence.

The statutes pleaded, especially the first, cover the Railway Clauses Consolidation Act, and include everything in connection with railways that it is possible to think of, and while, no doubt, it is true that a negative pleading gives no right to particulars, yet, where it relies upon certain sections of the statute as a defence, I think the defence relied upon should be given either as particulars or in the defence itself: *Pullen v. Snelus* (1879), 40 L.T.N.S. 363.

The order for particulars will go as in *Jennings v. Grand Trunk R.W. Co.*, 11 P.R. 300. Costs in the cause.

May 27. Upon appeal by the defendants the Master’s order was varied by BOYD, C., so as to require the defendants to give particulars of any special defences relied on under their plea of “not guilty by statute.” Costs in the cause.

The defendants again appealed, and their appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., and LOUNT, J., on the 10th June, 1901.

D. L. McCarthy, for the appellants.

H. T. Beck, for the plaintiff.

July 20. MEREDITH, C.J.:—This appeal is by the defendants from an order of the Chancellor, dated 27th May, 1901, requiring them to give particulars of any special defences relied on under their plea of “not guilty by statute,” which, in addition to other defences, the defendants have pleaded in answer to the plaintiff’s claim, other than those specifically pleaded.

The defendants by 16 Vict. ch. 37, which incorporates the provisions of 14 & 15 Vict. ch. 51, sec. 20, now 51 Vict. ch. 20, sec. 287 (D.), are allowed, in suits for indemnity for any damage or injury sustained by reason of the railway, to plead the general

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issue and give those Acts and the special matter in evidence at any trial to be had thereupon and to prove that the act complained of was done in pursuance and by the authority of those Acts; and the question for decision on the appeal is, whether the provisions of Con. Rule 299 as to the ordering of a further and better statement of claim or of further and better particulars of any matter stated in any pleading, apply to the case of a defendant who has the right to plead the general issue by statute and avails himself of that right by pleading it.

As said by Mr. Justice Wilson in *Cairns v. Water Commissioners for Ottawa* (1876), 25 C.P. 551, at p. 554, "the memorandum of the statute is in the way of particulars of the plea, just as the items of account under a plea of set-off are the particulars of that plea, although they are no part of the record in the ordinary sense of being pleaded to."

It appears to me that to require a defendant entitled to plead such a plea, who properly pleads it, to give particulars of the defence intended to be set up, would be practically to defeat the very object which the Legislature had in view in allowing him to plead in that way, *i.e.*, that he should be at liberty to give in evidence the special Act and the special matter.

It may be conceded for the purpose of the argument, though it is unnecessary to decide, that it would be competent for the Legislature of the Province to take away the right of pleading "not guilty by statute" from a person or company upon whom it has been conferred by legislation of the former Province of Canada, but, instead of doing that, the right to so plead is expressly preserved to a defendant entitled to it by Con. Rule 286, which provides as follows:—

"286. Nothing in these Rules shall affect the right of a defendant to plead not guilty by statute. A defence of not guilty by statute shall have the same effect as heretofore."

This Rule also, in my opinion, excludes the application of Con. Rule 299 to such a defence, for, according to its terms, nothing in the Rules is to affect the right of a defendant to plead "not guilty by statute," and to require particulars of the defence to be delivered other than a statement of the year of the reign and chapter and section of the Act relied on would plainly, I think, affect that right by materially limiting it.

In *Jennings v. Grand Trunk R.W. Co.*, 11 P.R. 300, the plaintiff having shewn that he was not aware of the defence intended to be set up, qualified particulars of a defence of "not guilty by statute" were ordered.

I am not aware that that case has been followed in practice, and at all events I am of opinion, for the reasons already stated, that it was not well decided.

The appeal must be allowed and the order appealed from discharged, and the costs here and below will be to the defendants in any event of the action.

LOUNT, J., concurred.

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MACLAUGHLIN ET AL. V. LAKE ERIE AND DETROIT RIVER
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Pleading—Reply—Departure—Contract—Repudiation—Reformation.

April 4.
May 21.
June 7.

Briefly, the pleadings were as follows: The plaintiffs alleged that they supplied the defendants, under an agreement, with patent brakes for use on their railway, and that the defendants altered them and infringed the plaintiffs' patent. The defendants alleged that they had a right under their agreement with the plaintiffs to do what they had done. The plaintiffs, by their reply, denied any such agreement, and alleged that if the written agreement did give any such right, it was not the true agreement, and they asked to have it reformed:—

Held, that there was no departure in the reply; for the fact that, by mutual mistake, the written agreement did not set forth the true agreement between the parties in this particular respect was a perfectly good answer to the plea of the agreement, and it was not necessary that the agreement should be actually corrected before the mistake could operate as an answer to its terms.

Held, also, that, even if the portion of the agreement upon which the defendants relied was contained in the same instrument as the "agreement" mentioned in the statement of claim, the plaintiffs might, consistently with their relying upon one part of it, ask to have another part reformed.

MOTION by the defendants to strike out the second and third paragraphs of the reply, on the ground that the same were improperly pleaded and inconsistent with the statement of claim and embarrassing.

The action was begun on the 24th January, 1901, by William G. MacLaughlin, as sole plaintiff. The indorsement on

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the writ of summons shewed that the plaintiff's claim was for an injunction to restrain the defendants from further infringing the plaintiff's patent respecting air brakes, for damages, and for an accounting. On the 19th February, 1901, an order was made adding the MacLaughlin Automatic Air Brake Company, Limited, as plaintiffs, and allowing an amendment of the proceedings accordingly.

The statement of claim was delivered on the 18th March, 1901. It stated (2) that the plaintiff W. G. MacLaughlin was the inventor and patentee of a new and useful improvement in automatic air brakes (describing the main objects of it); (4) that the plaintiff W. G. MacLaughlin obtained a patent for the exclusive right to manufacture and sell the apparatus and devices, from the Dominion of Canada, on the 23rd July, 1900; (5) that after having obtained such patent the plaintiff W. G. MacLaughlin entered into an agreement with the defendants under and by virtue of which he supplied them with a number of his brake mechanisms, and attached them to the defendants' rolling stock, putting them in working order for the purpose of the defendants operating them on their road, and for these the defendants agreed to pay a stipulated price; (6) that the defendants continued to operate and use the brakes so furnished to them by the plaintiff, in their original condition, but in or about December, 1900, the defendants permitted their servants to remove portions of such brakes, and to alter the construction thereof to the detriment thereof, replacing the same so altered upon the rolling stock, and using or attempting to use the brakes in their altered condition; (7) that the alterations made produced the same results as were claimed in the patent granted to the plaintiff and were fully covered thereby; (8) that the means by which reciprocation of air fluid was maintained or attempted to be maintained by the defendants' employees was not a new discovery, but actually formed part of the device patented by the plaintiff, but the alterations made by the defendants consisted in a transposition in place of such means, and was an infringement of the plaintiffs' rights; (9) that the defendants and their employees asserted that the alteration formed a new and useful improvement in automatic air brakes, and the altered form of the brake was being exploited for the

purpose of ultimately applying for a patent therefor; (10) that the alteration was a defective and imperfect device for obtaining the objects desired, and the brakes so altered were imperfect and defective, and were being masqueraded as the plaintiffs' brake, and were bringing the invention and discovery of the plaintiff W. G. MacLaughlin into disrepute and doing injury to the plaintiffs; (11) that the defendants had manufactured new brake mechanisms like the plaintiffs', with the alterations forming part thereof, and had affixed the same to their rolling stock and used them upon their road; (12) that in the beginning of January, 1901, the plaintiff W. G. MacLaughlin, having been made aware of what was being done by the defendants, notified the defendants to desist from infringing his patent, but without effect, and as a result commenced this action; (13) that his patent was on the 19th February, 1901, duly assigned by the plaintiff W. G. MacLaughlin to his co-plaintiffs, the MacLaughlin Company, who were thereupon added as plaintiffs; (14) that the defendants, by some of their officers and servants, had made malicious misstatements respecting the plaintiffs' brake, and injured the plaintiffs.

The prayer was for an injunction restraining the defendants from further infringing the plaintiffs' patent respecting automatic air brakes by using or permitting to be used in connection with their engines, cabs, cars, and coaches, an altered form of the plaintiffs' brake, or any brake which is an imitation of it, or an infringement thereon, or from permitting to be used the said engines, etc., "for the purpose of exploiting an infringing brake and from masquerading any other brake under the name of the said inventor;" damages and costs.

By the statement of defence the defendants (1) admitted the plaintiffs' patent; (2) alleged the agreement referred to in the 5th paragraph of the statement of claim; (3) admitted that any alterations made to the air brakes furnished by MacLaughlin were covered by his patent and were part of his invention; (4) alleged that under the agreement the defendants had a right to use the invention of MacLaughlin and to equip their rolling stock in whole or in part therewith; (5) denied the allegations in the 9th, 10th, 11th, and 14th paragraphs of the statement of claim; (6) alleged that they had done nothing they were not entitled to do under the terms of the agreement.

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The reply was as follows :

1. The plaintiffs join issue upon the statement of defence.
2. The plaintiff company deny that they are in any wise bound by the agreement referred to in paragraph 2 of the defence.
3. The plaintiff W. G. MacLaughlin alleges that the agreement in question does not in any way confer, nor was it intended to confer, upon the defendants any such right as is claimed by them in their statement of defence, but says that, if such is the true interpretation of the agreement, it does not express the bargain entered into between him and the defendants, and in case of such interpretation it would be an agreement without consideration, and therefore unenforceable; and he has already, and prior to the filing of the statement of claim herein, repudiated the said agreement by notice to the defendants; and such plaintiff further claims that he has the right to repudiate such agreement for the reasons stated; and, if not, then he hereby submits that such agreement should be rectified so as to express the true bargain between himself and the defendants, the true bargain being that the defendants should purchase from him and use the brake in question in this action without any privilege whatever to manufacture the same themselves, or to use any alteration or infringement thereof.

The motion was heard by Mr. Winchester, the Master in Chambers, on the 2nd April, 1901.

W. H. Blake, for the defendants.

W. Pinkerton, for the plaintiffs.

April 4. THE MASTER IN CHAMBERS:—Upon reading the pleadings, I am of opinion that the reply as objected to is an improper one, and must be struck out; the plaintiffs to have liberty to apply to the trial Judge to amend their statement of claim if so advised; costs to the defendants in any event.

The plaintiffs appealed from this order, and their appeal was heard by MEREDITH, C.J.C.P., in Chambers, on the 29th April, 1901.

F. C. Cooke, for the appellants.

W. H. Blake, for the defendants.

May 21. MEREDITH, C.J.:—This is a motion by the plaintiffs by way of appeal from an order of the Master in Chambers dated the 4th April, 1901, directing paragraphs 2 and 3 of the reply to be struck out; or, in the alternative, for an order allowing the appellants to amend their statement of claim by setting up therein the matters contained in the paragraphs of the reply so struck out.

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If I viewed the statement of claim, as Mr. Blake contended and the Master in Chambers seems to have thought that it should be, as an action brought on the agreement mentioned in paragraph 5 and to enforce its provisions against the respondent company, I should uphold the order appealed from, for in that case the second and third paragraphs of the reply would be inconsistent with the statement of claim, and what under the old form of pleading was termed a departure from the original pleading, but I am unable to agree that the claim of the appellants is on the agreement and to enforce its provisions. It is, in my opinion, an ordinary action by a patentee to restrain an alleged infringement of his patent and for damages for the infringement and for injury which is said to have been sustained by the appellants owing to the respondents having put forward certain of the patented articles which had been supplied to them under the agreement after having altered them, as the appellants contend, so as to make them imperfect and defective, as brakes manufactured according to the appellants' patents, and so to bring the appellants' invention into disrepute and to injure the appellants, and if this be so I do not see why, consistently with the interpretation given by the Court of Appeal to the English Rules corresponding, as far as the question before me is concerned, with Consolidated Rules 256, 268, in *Hall v. Eve* (1876), 4 Ch. D. 341, it was not open to the appellants, when the agreement was pleaded as a justification for the acts complained of, to set up by way of reply any matter which ought to prevent the agreement being given effect to, for the purpose for which it was set up, or, in other words, to confess and avoid the agreement.

The appeal must, therefore, be allowed and the order appealed from be discharged, with costs here and below to the appellants in any event of the action.

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The defendants appealed from the decision of MEREDITH, C.J., and their appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and STREET, J., on the 3rd June, 1901.

A. W. Anglin, for the appellants. The reply is inconsistent with the statement of claim, and raises new grounds of claim, and under Rules 288 and 298 the paragraphs complained of should be struck out. The defendants do not contend that the action is brought on the agreement in question; they admit that it is an action of infringement. It is not, however, an ordinary action of infringement against strangers to the patent. An agreement is set up in paragraph 5 of the statement of claim, which is expressly admitted by paragraph 2 of the statement of defence. The agreement dealt with by the reply, and which in the reply is alleged to have been repudiated by notice, is expressly stated to be "the agreement referred to in the second paragraph of the statement of defence." There can be no question that the agreement dealt with by the three pleadings is the same agreement, and that in the reply the plaintiffs seek to repudiate an agreement set up in the statement of claim. It is immaterial that the plaintiffs might have sued in infringement without setting up the agreement. They have set it up, and the reply is therefore inconsistent with the statement of claim. Under the allegations in the statement of claim, only alterations in the patented machines can be complained of. Under the reply the making or use of the machines in any form would be an infringement. If the plaintiffs had sued the defendants as strangers, alleging infringement, the defendants might have elected either to plead license or to accept the revocation of their license and dispute the validity of the patent, and if the plaintiffs are to have the right to set up a claim of revocation, the defendants should in justice have this election. On the pleadings as they stand they have never had such an election. The statement of claim having set up the agreement in question, the defendants could not conceive that it would be repudiated. They took the only course open to them, and admitted the agreement, claiming that it justified all their acts. Then by the reply the repudiation was set up, and of course no further pleading by the defendants is allowable without leave. The case somewhat resembles *Hurd v. Bostwick*

(1894), 16 P.R. 121. *Williamson v. London and North Western R.W. Co.* (1879), 12 Ch. D. 787, is an authority for striking out the whole of the reply where embarrassing. In *Hall v. Eve*, 4 Ch. D. 341, there was no inconsistency, as there is here. The reply alleges that the repudiation was by notice given "prior to the filing of the statement of claim." This presumably means after writ issued, which is improper: *McLean v. McLean* (1897), 17 P.R. 440.

F. C. Cooke, for the plaintiffs. A perusal of the pleadings shews that the reply is not inconsistent with the former pleading delivered, and this is the only ground upon which the reply can be struck out. The widest latitude is permitted in pleading by way of reply, and the plaintiff is not confined to the former pleadings, but may set up new material, and may confess and avoid: see *Hall v. Eve*, 4 Ch. D. 341.

June 7. STREET, J.:—The plaintiffs in their statement of claim say they obtained a patent and supplied the defendants with the patented article under an agreement between them in order that the defendants might use it in operating their railway; that the defendants made certain alterations in the articles supplied them, which are not a new device, but come under their patent; that the defendants claim they are a new device, and intend to apply for a patent; and further that they act imperfectly, and, being marked with the plaintiffs' name, tend to bring their patented article into disrepute. They ask for an injunction to restrain the defendants from using an altered form of the plaintiffs' patented article, and from infringing his patent.

The defendants in their statement of defence admit the plaintiffs' patent, and crave leave to refer to it; they admit that they are using the plaintiffs' patented article under an agreement with them, to which they crave leave to refer; they admit that the alterations made by the defendants are covered by the plaintiffs' patent, and they have never disputed the fact, but they claim that under the said agreement with the plaintiffs they have a right to use the plaintiffs' article and to equip their rolling stock with it. They deny all the other allegations of the statement of claim.

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The plaintiffs in reply join issue; they deny that they are bound by the agreement referred to in the statement of defence; they say they have repudiated any liability under it by notice to the defendants before the filing of the statement of defence; that the only bargain between the plaintiffs and defendants is that the defendants should purchase the article from the plaintiffs, and use it without any privilege to manufacture it or to use any alteration or infringement of it, and that if the said agreement sets forth any different meaning, it should be rectified.

Shortly stated, these pleadings seem to tell the following story. The plaintiffs say they supplied the defendants under an agreement with their patent brakes for use on their railway, and that the defendants altered them and infringed their patent. The defendants say that they have a right under their agreement with the plaintiffs to do what they have done. The plaintiffs reply, denying any such agreement, and further allege that if the agreement between them gives any such right, it does not contain the real agreement, and they ask to have it reformed so as to set forth the real agreement.

I think there is no departure in the special part of this reply, for the fact that by mutual mistake the written agreement does not set forth the true agreement between the parties in this particular respect is a perfectly good answer to the plea of the agreement, and it is not necessary that the agreement should be actually corrected before the mistake can operate as an answer to its terms: *Breslauer v. Barwick* (1876), 36 L.T. 52; *Bullen & Leake*, 5th ed., 788-9; *Hall v. Eve*, 4 Ch. D. 341.

It was argued that the plaintiffs in their reply are seeking to repudiate an agreement which they set up in their statement of claim; but this is not so. Even if the portion of it upon which the defendants rely is contained in the same instrument as the "agreement" mentioned in the statement of claim, the plaintiffs may, consistently with their relying upon one part of it, ask to have another part of it reformed.

The appeal must, therefore, in my opinion, be dismissed with costs to the plaintiffs in any event.

FALCONBRIDGE, C.J.:—With great reluctance, I concur in the dismissal of this appeal.

The cases of *Hall v. Eve*, 4 Ch. D. 341, and of *Breslau v. Barwick*, 36 L.T. 52, are more binding on us than is *Duckworth v. McClelland* (1878), 2 L.R. Ireland 527, which I should prefer to follow.

I have frequently had occasion to deplore the present condition of pleading. In most cases which come to trial it would be quite as well to have no pleadings at all.

This reply is most slovenly and inartificial. It is not even stated why the agreement should be repudiated or rectified, *e.g.*, by reason of mutual mistake, or fraud of the other contracting party.

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[DIVISIONAL COURT.]

FIRST NATCHEZ BANK V. COLEMAN.

Stay of Proceedings—Action in Foreign Court—Reasons for Bringing—Judicature Act, sec. 57 (10).

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Where there are substantial reasons for the double litigation, the Court will not stay proceedings in an action in Ontario until after the determination of another action for the same cause pending in a foreign Court.

The power to stay proceedings under sec. 57, cl. 10, of the Judicature Act, R.S.O. 1897 ch. 51, is a discretionary one, and the English cases are authorities as to the exercise of the discretion, although there is no similar statutory provision in England.

Where the defendant, resident in Ontario, was sued there upon a promissory note, the Court refused to stay the action until after the determination of an attaching proceeding in a foreign Court, the only effect of which, if successful, would be to make available towards payment of the note certain stock in a company domiciled in the foreign country.

AN appeal by the plaintiffs from an order of one of the local Judges at Goderich staying all further proceedings in this action until after the determination of another action for the same cause now pending in a foreign Court.

By sec. 57, cl. 10, of the Judicature Act, R.S.O. 1897 ch. 51, it is provided: "If any action is brought in the High Court for any cause of action for which any suit or action has been brought and is pending between the same parties or their

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representatives in any place or country out of Ontario, the Court or any Judge thereof may make an order to stay all proceedings in the High Court until satisfactory proof is offered to the Court or Judge that the suit or action so brought in such other place or country out of Ontario is determined or discontinued."

The appeal was heard by FALCONBRIDGE, C.J.K.B., in Chambers, on the 17th May, 1901.

W. E. Middleton, for the plaintiffs, cited *McHenry v. Lewis* (1882), 22 Ch. D. 397; *Peruvian Guano Co. v. Bockwoldt* (1882-3), 23 Ch. D. 225; *Mutrie v. Binney* (1887), 35 Ch. D. 614; *Phosphate Sewage Co. v. Molleson* (1876), 1 App. Cas. 780; *Direct United States Cable Co. v. Dominion Telegraph Co.* (1883), 8 A.R. 416, at p. 435.

J. H. Moss, for the defendant.

May 20. FALCONBRIDGE, C.J.:—There is no clause corresponding to sec. 57, cl. 10, of the Ontario Judicature Act in the English Act, and the rules laid down in the cases cited by Mr. Middleton as to the existence of substantial reasons justifying a plaintiff in suing in both countries, do not apply here.

This being the case, I shall not require the additional material or information which I thought at the argument I might call for.

The order is right, and the appeal is dismissed with costs to the defendant in any event.

The plaintiffs appealed from this decision, and their appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., and LOUNT, J., on the 10th June, 1901.

The same counsel appeared and the same cases were cited.

July 20. MEREDITH, C.J.:—Appeal by the plaintiffs from an order of the Chief Justice of the King's Bench, dated 20th May, 1901, dismissing their appeal from an order of one of the local Judges at Goderich staying all further proceedings in this action until after the determination of another action for the same cause now pending in the District Court of the parish of

Concordia in the State of Louisiana, one of the United States of America.

The respondent resides in Ontario. The proceeding instituted in the Louisiana Court is in the nature of an attachment or garnishee proceeding, and its sole object, and effect if successful, will be to make available towards the payment of the note sued in this action certain stock which the respondent is said to hold in the Vidalia Lumber and Manufacturing Company, limited, domiciled in the parish of Concordia.

The only judgment which according to the law of Louisiana the plaintiffs can obtain there against the respondent, and the only one claimed by them in the proceedings in that State, is a judgment for the amount of the note and interest to the extent of the value of the property and effects of the respondent which have been attached there.

It is clear that according to the English cases cited by Mr. Middleton, the pendency of the proceedings in Louisiana would form no ground for staying an action in an English Court brought to recover the amount of the note sued on.

These cases establish that the English Courts will not consider the double litigation vexatious where there are substantial reasons to induce the plaintiff to sue in both countries, as when he can get judgment in each action, but execution is more easily obtained in one than in the other, and it is clear, I think, that in such a case as this an order would not be made staying proceedings in an English Court.

The learned Chief Justice upheld the order of the local Judge because of the provisions of sub-sec. 10 of sec. 57 of the Judicature Act, being of opinion that the principle of the English decisions was inapplicable here because of that enactment, which is not to be found in the English Judicature Act.

I am, with respect, of opinion that the principle of the English cases ought to govern in the exercise by the Court of the power conferred by the Act. The power is a discretionary one, and there is no reason why a different principle should be applied because in the one case the power exercised is inherent in the Court while in the other it is exercised under the authority of a statute. It would appear to me, indeed, that

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our statutory provision is but declaratory of the law as it existed before the statute.

Sub-section 10 had its origin in 29 & 30 Vict. ch. 42, sec. 4, an Act to amend the Common Law Procedure Act, and may have been passed because of doubts which appeared to have been entertained in consequence of the decision in *Cox v. Mitchell* (1859), 7 C.B.N.S. 55, as to the jurisdiction of the Court to make such orders.

The appeal must be allowed and the orders of the learned Chief Justice and of the local Judge be discharged, with costs to the plaintiffs in any event of the action.

LOUNT, J., concurred.

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May 28.

LAWRY V. TUCKETT-LAWRY.

Practice—Frivolous Action—Action by Wife for Alienation of Her Husband's Affections—Cons. Rules 259-261.

The plaintiff brought this action against another woman for alienating her husband's affections, committing adultery with him and inducing him to leave the plaintiff and go to the United States, whereby she was deprived of the services and support of her husband and of the exercise of the remedies provided by the Criminal Law for the support of wives.

Held, that *Lellis v. Lambert* (1897), 24 A.R. 653, leaving nothing to be said in support of the plaintiff's action, the same must be dismissed with costs.

THIS was a motion under Rule 261 to strike out a statement of claim in an action as vexatious and disclosing no reasonable cause of action.

The statement of claim alleged that the plaintiff was the wife of Thomas Henry Lawry to whom she was married in 1897 and by whom she had two children; that up to March, 1901, she and her husband lived together at Hamilton, in this province, her husband always providing for her and her children; and proceeded as follows:—

5. Since the date of the plaintiff's marriage to the said Thomas Henry Lawry, the defendant (an unmarried woman) has unlawfully sought in various seductive and wicked ways to induce the plaintiff's husband to visit her at her home in the

said city of Hamilton and at Toronto and at other places, for the purpose of committing adultery with the plaintiff's said husband and the plaintiff's said husband has so visited the defendant and committed adultery with her.

6. Since the date of the plaintiff's said marriage the defendant has unlawfully procured and enticed the plaintiff's husband to absent himself from the plaintiff and to continue absent and apart from her and has alienated his affections from her and has had criminal conversation with him, and the plaintiff has been thereby deprived of the society, services and support of her said husband and his aid and assistance in her domestic affairs.

On or about March 21st, 1901, the defendant unlawfully persuaded, procured and enticed the plaintiff's said husband to abandon the plaintiff and to accompany the defendant to the United States of America and out of the jurisdiction of this Court, whereby the plaintiff was deprived of the society, services and support of her husband and of the exercise of the remedies provided by the criminal law of this Dominion for the non-support of wives.

8. The plaintiff's husband so left and abandoned her without her consent and he is still absent from the plaintiff and out of the jurisdiction of this Court, and the plaintiff is without means of support as her said husband has neglected and refused to provide for the said plaintiff ever since he left her on March 21st, aforesaid, and by reason of the aforesaid actions of the defendant in regard to the said Thomas Henry Lawry the plaintiff has suffered mental and bodily pain, loss of reputation and the esteem of her friends and was otherwise damnified as aforesaid.

The plaintiff, therefore, claims \$25,000.

The motion was argued in the Weekly Court on May 16th, 1901, before FALCONBRIDGE, C.J.K.B.

E. Martin, K.C., for the defendant, contended that the case was covered by *Lellis v. Lambert* (1897), 24 A.R. 653, and that unless that was reversed the plaintiff could not succeed; and that case shewed what happened if such points were not disposed of before trial. He also cited *Quick v. Church* (1893),

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23 O.R. 262; *Burstall v. Beyfus* (1884), 26 Ch.D. 35; *Chaffers v. Goldsmid*, [1894] 1 Q.B. 186; *Brennen v. Brennen* (1890), 19 O.R. 327; *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch.D. 489, especially at p. 496; Holmsted and Langton's *Judicature Act*, 2nd ed., p. 443; *Snow's Annual Practice*, 1901, at pp. 324-5.

Teetzel, K.C., and *G. C. Thomson*, for the plaintiff, contended that this was not a case within Rule 261; that here there was a substantive claim that the defendant had deprived the plaintiff of the society, services, and support of her husband, and of colluding with her husband to defeat the plaintiff's rights both civil and criminal; that this distinguished this case from *Lellis v. Lambert*; and that if the motion succeeded, the plaintiff would be effectually deprived of her rights, as it was an interlocutory matter, and no appeal would be allowed to the Supreme Court: Supreme and Exchequer Court Act, R.S.C. ch. 135, sec. 26, sub-sec. 3, and sec. 27; *Griffith v. Harwood* (1900), 30 S.C.R. 315; *Hamel v. Hamel* (1896), 26 S.C.R. 17; *Rural Municipality of Morris v. London and Canadian Loan and Agency Co.* (1891), 19 S.C.R. 434; *Maritime Bank of the Dominion of Canada v. Stewart* (1891), 20 S.C.R. 105; *Salaman v. Warner*, [1891] 1 Q.B. 734; *Standard Discount Co. v. La Grange* (1877), 3 C.P.D. at p. 71; *Jones v. Insole* (1891), 64 L.T.N.S. 702; *Re Gardner, Long v. Gardner* (1894), 71 L.T.N.S. 412; *In re Riddell, Ex parte Earl of Strathmore* (1888), 20 Q.B.D. 512.

May 28. FALCONBRIDGE, C.J.K.B.:—The judgment of the Court of Appeal in *Lellis v. Lambert*, 24 A.R. 653 (overruling *Quick v. Church*, 23 O.R. 262), seems to leave nothing to be said in support of plaintiff's right to maintain this action.

And this appears to be a clear case for the application of Rules 259-261.

The law of Ontario being well settled to-day, I ought not to be concerned with the consideration of where or in what form may lie the ultimate appeal from this order, nor to be astute to help the plaintiff in her efforts to have *Lellis v. Lambert* declared not to be the law.

The statement of claim will be struck out on the ground that it discloses no reasonable cause of action, and the action dismissed with costs.

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REX EX REL. WALTON V. FREEBORN.

1901
March 25.

Municipal Elections—Controverted Election—Allowance of Recognizance—Defective Nominations—Powers of Returning Officer—Omission to State Full Name—R.S.O. 1897 ch. 223 sec. 128 (1), 220 (2).

When in a controverted municipal election a recognizance has been duly entered into with sureties and affidavit of justification as required by R.S.O. 1897 ch. 223, sec. 220 (2), the security is completed; but the Judge may postpone endorsing his allowance of it until objection raised. Such interlocutory procedure is matter of discretion, and not subject of appeal. The provisions of R.S.O. 1897 ch. 223, sec. 128, (1) that every nomination is to state the full name, etc., of the candidate are directory, not imperative; and the presiding officer cannot after the close of the meeting for nominations reject those made on account of non-compliance with such requirements. *Semble*, if objection is taken at the time, and the nominations are not amended, the presiding officer should then and there reject them.

THIS was an appeal in a *quo warranto* matter from the judgment of the Judge of the district court of the district of Parry Sound, pronounced upon March 12th, 1901, overruling the preliminary objections taken by counsel on behalf of the respondents Joseph Jenkins and David Harrison to the regularity and sufficiency of the relator's proceedings, and whereby it was adjudged that the said Jenkins and Harrison were usurping the office of councillor for the township of Chatham, and that they should be removed therefrom and their election be set aside, and that a new election be held by the sheriff of the district of persons in their place. The third respondent, James Switzer Freeborn, had been declared elected reeve by acclamation.

The preliminary objections referred to, and the grounds upon which the election of the respondents was attacked, are sufficiently stated in the judgment of BOYD, C., before whom the appeal was argued in Chambers on March 22nd, 1901.

W. M. Douglas, K.C., for the respondents.

Frank Powell, for the reeve.

W. D. McPherson, for the relator.

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The following were referred to on the argument: *Mather v. Brown* (1876), 1 C.P.D. 596; *Henry v. Armitage* (1883), 12 Q.B.D. 257; *West Simcoe Case* (1883), 1 E.C. 128; *Reg. ex rel. Corbett v. Jull* (1869), 5 P.R. 41; *Reg. ex rel. Grant v. Coleman* (1882), 7 A.R. 621, 626; *Morris v. Burdett* (1813), 2 M. & S. 212; *Town of Trenton v. Dyer* (1893), 21 A.R. 379; Biggar's Mun. Man. pp. 150, 241; Maxwell on Statutes, 3rd ed., p. 521; R.S.O. 1897, ch. 223, secs. 128, 129, 142 (2) 220, 226, 243; Con. Rules (1888), 1038; Con. Rules (1897), 198, 312.

March 25. BORD, C.:—When application was made in this case to institute proceedings there was laid before the learned Judge, not only the affidavit of the relator setting forth the grounds of objection, but also his recognizance accompanied by the affidavit of justification by two sureties. These were all filed by the Judge on February 9th, 1901, and thereupon he granted his fiat permitting notice to be served under sec. 220, R.S.O. 1897 ch. 223.

It appears that he did not mark upon the recognizance or fiat the words "recognizance allowed" till February 28th, on which day the motion was heard, and it is contended that his act of allowance that day was *ultra vires*. I see nothing in the statute leading to this conclusion. On the contrary, when the usual recognizance has been entered into by the relator and his bail or sureties, with statutory affidavit of justification, the security is completed and it is his duty to allow it as sufficient (sec. 220, sub-sec. 2: *Regina ex rel Harwood v. Fournier* (1892), 14 P.R. 463n). The security was in this case, therefore, as to this objection sufficient when the fiat was given, and the declaration in writing that it was so might be made at any time even when the omission is noticed. This whole interlocutory procedure is within the discretionary jurisdiction of the Judge, and it is not a subject of appeal.

Upon the merits, it is to me very plain that the decision is unimpeachable. Upon the undisputed facts there was the usual meeting of ratepayers on the day fixed for nominating municipal candidates. Several persons were proposed and seconded *seriatim* to fill the office of a reeve and the offices of councillors. These nominations were put on file by the presid-

ing officer, and duly entered in the minute book of the township. Then as stated by Edgecumbe and not controverted, at the close of the said nomination, the acting clerk who presided called all the candidates forward to the platform to address the rate-payers, having first read out the list of nominations and declared all the nominees mentioned in the nomination papers as the persons nominated for the offices of reeve and councillors respectively.

More candidates were proposed for the offices than were required to be elected, so that it was as of course that the proceedings for filling the offices should be adjourned until the first Monday in January, *i.e.*, 9th, when the election would be prosecuted by the polling of votes.

But on January 2nd the presiding officer, having examined the nomination papers came to the conclusion that all were to be rejected and treated as nullities which did not contain the full name of the candidates, *i.e.*, all with only initials before the surname he cast out, and declared the respondents elected by acclamation.

No such power is given to him by the statute. Whatever he might have done in the way of objection or rejection during the hour on the first day fixed for active nomination his controlling function ceased when that meeting closed with several candidates before the ratepayers. Barring the contingency of resignation provided for in sec. 128, sub-sec. 3, it was then left for the electorate to make choice among the candidates. The stage was reached at which the poll should be taken, and the power assumed by the acting clerk has frustrated the right of the electors. The present Municipal Act provides for two things:—

1. That the candidate shall be proposed and seconded in open meeting according to the ancient method of free men, and

2. That the nomination shall be in writing stating the full name, place of residence and occupation of the candidates, and shall be signed by his proposer and seconder: R.S.O. 1897 ch. 223, sec. 128 (1).

This latter is a new provision which may be of great and obvious utility in crowded constituencies, when people do not know their neighbours, but in the sparsely settled rural districts no

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such caution would seem to be needed to protect or inform the choice of the people. Still as a direction of the law it should not be wilfully slighted or disregarded. When at the time attention is called to the omission in the particulars required, or objection is raised by the presiding officer to the reception of informal papers,—if those interested refuse to amend, it may well be the duty of the officer to enforce the law and not accept such paper, and inform the meeting that the person nominated was not legally a candidate. But here everything was treated as regular. The candidates were called forward to address the meeting, and the ratepayers present representing the constituency returned to their homes satisfied that the choice of officers for the year would be determined by the ballot at the poll. This state of affairs should therefore be restored as far as possible, and the judgment directing that the election be held is affirmed with costs.

A. H. F. L.

[DIVISIONAL COURT.]

HENNING ET AL. V. MACLEAN ET AL.

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1900

Nov. 19.

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July 17.

Will — Construction — Alternative Disposition — Death of Testator and Wife “at the Same Time” — Executors — Technical Breaches of Trust — Limitation of Actions — “Honestly and Reasonably.”

The testator bequeathed to his wife all his estate and appointed her his executrix. His will then proceeded: “In case both my wife and myself should by accident or otherwise be deprived of life at the same time, I request the following disposition to be made of my property”—disposing of his estate and appointing executors. The will made no provision for any other event. The testator and his wife shortly after the will was made went to Europe, and both of them died there, the wife on the 11th December, 1888, and the testator on the 27th of the same month:—

Held, that the testator and his wife were not deprived of life at the same time, the deaths not being the result of a common accident or other catastrophe, but due to ordinary disease; and, as the actual event was not provided for, there was an intestacy.

There is nothing irrational or absurd in the provision that the alternative dispositions of the will should take effect only in the event of the testator and his wife being deprived of life at the same time, even if the words “at the same time” be read as meaning, without any interval of time elapsing between the death of one and that of the other.

Held, also, that, although the appointment of executors to carry out the alternative provisions of the will never took effect, the persons named as executors, having obtained probate, became trustees for the persons entitled upon an intestacy; payments made by them to those who would have been beneficially entitled if the alternative provisions had taken effect were breaches of trust; but the statute of limitations was a bar to a recovery in respect of any of those breaches which occurred more than six years before the action was brought: R.S.O. 1897 ch. 129, sec. 32.

Held, moreover, that the executors were entitled, under 62 Vict., 2nd sess., ch. 15 (O.), to be relieved from personal liability for all breaches of trust committed by them, they having acted honestly and reasonably, in view of the facts that the construction of the will was doubtful, that the trial Judge took the same view of its effect as they did, and that for eleven years everybody interested in the estate acquiesced in that view.

THOMAS HENNING died on the 27th December, 1889, at Florence, Italy, having first duly made and published his last will and testament, which was in part as follows:—

“I give and bequeath to my wife Isabella Henning all the estate real and personal which I may possess at the time of my death, and I do hereby make and ordain my wife Isabella Henning executrix of this my last will and testament.

“In case both my wife and myself should by accident or otherwise be deprived of life at the same time, I request the following disposition to be made of my property, viz.:—

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"1. That the sum of \$500 annually (payable half yearly) be given to my brother John Henning . . . and that the same amount be continued to his wife Elizabeth and his daughter Jane Henning should they survive him. If the daughter Jane survives her mother Elizabeth I desire the sum of \$250 to be given annually to the Bursary Fund of Knox College, Toronto. On the decease of the said Jane Henning her portion, \$250, is to be given annually to the general fund for the support of Knox College, Toronto.

2. I leave the sum of \$500 per annum (payable half-yearly) to my wife's sister Marianne Ball. At her death the sum is to be divided equally between her daughters Catherine Isabella Maclean and Minnie MacTavish. On the death of either of these . . . her share is to be given annually to the fund for the Foreign Missions of the Presbyterian Church of Canada and on the death of the other her portion is to be paid annually to the Home Mission Fund of the same.

3. I request the sum of \$500 annually (payable half-yearly) to be given to my wife's sister Jane Mackenzie . . . On her death that sum is to be equally divided between her grandchildren Alice and Effie Rhind. . . . On the death of either of these her portion is to be given annually to the fund for the support of the aged and infirm ministers of the Presbyterian Church of Canada, and on the death of the other her portion is to be given annually to the fund for the widows and orphans of the Presbyterian Church of Canada.

4. I would request Mr. Kenneth Maclean . . . and Mr. Edward Betley Brown . . . to be good enough to act as executors of this my last will and testament and to divide equally between them what may remain of the annual income of my investments after paying the \$1,500 disposed of as above."

The will did not propose to dispose of the corpus of the estate, and did not provide for the event of the testator's wife predeceasing him.

A memorandum at the end of the will shewed that the testator's estate consisted of loan companies' shares of the par value of \$18,110, and that the annual dividends thereon amounted to \$1,621.

The testator's wife did predecease him, dying at Florence on the 11th December, 1888, sixteen days before the testator's death.

The persons named as executors in the 4th paragraph proved the will and acted under it until this action was brought, early in 1900, paying \$500 a year each to John Henning, Marianne Ball, and Jane Mackenzie as long as the annual income of the estate equalled or exceeded \$1,500, and when the dividends fell below that amount paying one-third of the income to each of them. Jane Mackenzie died some years before the action was brought, and after her death the executors paid one-third of the income to Alice Rhind and Effie Bartram (formerly Effie Rhind.)

Elizabeth Henning also died before the action was brought.

The plaintiffs, John Henning (named in the will) and several other persons, asserting themselves to be the next-of-kin and heirs-at-law of the testator, brought this action against the executors and all the persons and corporations named as beneficiaries in the will, and by their statement of claim, after setting out the facts, alleged :

(9) That Isabella Henning having predeceased her husband, the remaining clauses of the will never took effect, and there was an intestacy as to the estate of Thomas Henning, and they, being the heirs-at-law and next-of-kin, were entitled to the estate. (10) That the defendants Maclean and Brown, the executors, had from time to time since the date of the probate improperly paid out various sums of money belonging to the estate to the beneficiaries in the will mentioned.

The relief sought was : (1) A declaration that the plaintiffs were the heirs-at-law and next-of-kin of Thomas Henning and as such entitled to his estate. (2) The construction of the will and a declaration that the provisions of it became inoperative after the death of the wife of the testator. (3) An order that the defendants Maclean and Brown should account for the moneys or other property received by them in connection with the estate as executors or otherwise and pay and deliver the same over to the plaintiffs. (4) An injunction restraining the defendants Maclean and Brown from paying over any money belonging to the estate to any person other than the plaintiffs.

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The defendants Maclean and Brown, the executors, admitted the facts stated above, but did not admit the truth of the matters alleged in the ninth and tenth paragraphs of the statement of claim; they alleged that they had acted in good faith as executors of the will, and that all payments made by them as such executors were made to the beneficiaries as directed in the will, as far as the annual income of the estate enabled them so to do, but owing to the said annual income (through a decrease in the amount of annual dividends) becoming less than the amounts directed by the will to be paid annually, they, as such executors, had divided the annual income of the estate equally among the beneficiaries entitled thereto under the will; that probate of the will was granted to these defendants by the proper Court in that behalf, and that they, as such executors thereunder, had acted throughout in good faith and honestly and reasonably and had not been privy to any fraud in obtaining grant of probate of the will or otherwise, and they claimed the protection of the Acts in force in this Province to protect persons acting as executors and administrators, and alleged that under such Acts they were liable to account only for the part of the estate remaining in their hands undistributed, which they were ready and willing to do; they also claimed the right to act as executors until the grant of probate to them should be revoked by the proper Court; and they submitted their rights to the Court.

The defendants Marianne Ball, Catherine Isabella Maclean, and Minnie MacTavish repeated some of the allegations of their co-defendants the executors, and set up, besides, that the money and securities constituting the estate of Thomas Henning disposed of by his will were in reality the joint property of his wife Isabella Henning and himself, but allowed by her to stand in his name solely to save her from trouble, and that the will in question was intended as a joint settlement of such property, and was made pursuant to an agreement made between them, by which, on account of the larger part of the property having been acquired by her exertions, they agreed to give two-thirds of the income to certain of her relatives for their lives, and one-third to certain of his relatives for their lives. These defendants also set up that the will was valid and that by it

the estate passed to the beneficiaries named in it, and that under the true construction all facts and things happened to bring the same into effect. They also alleged laches and acquiescence on the part of all the plaintiffs, and particularly on the part of John Henning, who had ever since the decease of Thomas Henning, *i.e.*, for eleven years, received under the will a one-third share of the income of the estate. These defendants also pleaded the statutes of limitation.

The other defendants defended upon similar grounds.

The action was tried at Toronto before FALCONBRIDGE, C.J.Q.B., without a jury, on the 24th September, 1900.

Certain persons alleged to be among the heirs-at-law and next-of-kin of the testator were added as defendants at the trial upon their written consents.

By the consent of the plaintiffs and defendants certain letters were put in evidence written by persons who were in attendance upon the testator and his wife during their last illnesses and at the time of their respective deaths, describing the circumstances. It was agreed that the statements in the letters should be taken as if they had been made by the writers on examination. These letters are referred to in the judgment of the Chief Justice.

It was also shewn in evidence that the testator had in his possession at Florence at the time of his death a duplicate of the will in question, and that both the will proved and this duplicate (produced) were in the handwriting of the testator.

Some evidence was also given, subject to objection by the plaintiffs, of the facts alleged by the defendants Ball, C. I. Maclean, and MacTavish as to the joint ownership of the property by the testator and his wife, and an agreement or understanding between them with regard to the disposition of it.

H. J. Scott, Q.C., and H. O'Brien, Q.C., for the plaintiffs.

Aylesworth, Q.C., and T. T. Rolph, for the defendants the executors.

Aylesworth, Q.C., and A. S. Ball, for the defendants Marianne Ball, C. I. Maclean, and M. MacTavish.

W. Mortimer Clark, Q.C., for the defendants Knox College and the Presbyterian Church in Canada.

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November 19, 1900. FALCONBRIDGE, C.J.:—The first question involved (and the only one, if it be answered in one way) is as to the meaning of the following words:—

“In case both my wife and myself should by accident or otherwise be deprived of life at the same time. . . .”

In the first clause of the will (which is holograph and so far as appears drawn by testator without legal assistance) he had made his wife sole devisee, legatee, and executrix.

Had he then in his mind three contingencies:—(1) his wife surviving him; (2) his surviving his wife; (3) their both being “deprived of life at the same time?”

Probably he had. In case (1) the first clause of the will would take effect. In case (2) he would be without a will and could consider anew the disposition of his property and the objects of his bounty.

Then is case (3) intended only to provide for the event of both perishing by some sudden and absolutely simultaneous catastrophe, *e.g.*, a stroke of lightning?

Or does it mean “practically at the same time?” The executors thought he meant the latter, and acted on that belief in dealing with the estate for eleven years, without objection on the part of anyone interested so far as appears.

Does not the use of the expression “by accident or *otherwise*” lend colour to this theory? Here is a layman, careful in the use of words, and not versed in any doctrine of *ejusdem generis*. Then, if he says “or otherwise” as pointing to an ordinary sickness as distinguished from an “accident,” which is a casualty, a contingency, an event happening without one’s foresight or expectation, or from an unknown cause—is it not significant and intentional?

Then if it has significance, does it not contemplate *some* interval of time between the deaths? For we can hardly conceive of death coming to both from what are termed natural causes at the same instant of time. Even in the case of two perishing in a shipwreck the civil law and the law of France and of some other countries recognize presumptions as to the survivorship of one or the other. The law of England recognizes none, but it is a question of fact to be determined; but

an interval is still a matter to be reckoned with, and not *négligeable*.

Then, conceding some interval of time, where is the line to be drawn? At a minute—an hour—a day—a week? Here it is sixteen days.

It seems long, but, under the circumstances, is it practically “at the same time?” It does not help us much to get the definition that at the same time means “at one time, not later,” once we arrive at the point of concluding that some interval was necessarily contemplated.

Now let us look at the sequence of events.

On Saturday the 8th December, 1888, the doctor came to see Mrs. H.

Sunday 9th, Mr. H. in bed, ill.

Tuesday 11th, both Mr. and Mrs. H. better, but in bed. Mrs. H. fell dead at 4 p.m. Mr. H. chose coffin that night.

Wednesday 12th, Mr. H. went to cemetery and chose grave. Signora Cecchi writing that day says: “He got a dreadful shock . . . and has been very poorly since . . . He is utterly broken down, and has become an old, old man during the past six days, so different from what he was a week or two ago.”

Writing on the 14th she describes Mr. H.’s condition on the 13th (Thursday); the doctor found him a trifle better but still in danger . . . ill from acute pneumonia and . . . suffering agony with every breath he drew. . . . He is still seriously ill but with chances in his favour, as Dr. Coldstream said. . . . Our great anxiety for poor Mr. H. has really taken up all our thoughts. I do hope and trust he may get over it, but we can only wait and leave no means untried. . . .”

Thursday 13th, Mrs. H. interred. Mr. H. did not go to the funeral.

14th to 24th—Mr. H. makes progress towards recovery, but “had no spirit left.” The signora says: “When Mrs. George Brown arrived we thought all danger was over.”

During this interval of apparent convalescence Mr. H. takes no steps in the direction of making a new disposition of his property by will.

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Tuesday 25th December, Mr. H. worse in p.m.

Wednesday 26th December, he gives Signor Cecchi a power of attorney to draw cheques and pay bills, etc., telling the signor that he had made a will, but had neither agent nor lawyer.

Thursday 27th, Mr. H. died at 8.15 a.m.

I may not regard Mr. H.'s statement to Signor C. as a republication in law; but it is a statement of what he believed to be the fact, which is inconsistent with the theory of intestacy.

Notwithstanding the interval of partial recovery, from the 14th to the 24th, it is now apparent that from the time of Mrs. H.'s death Mr. H. was in a moribund condition; and so they were deprived of life at the same time, in the reasonable and practical intendment of the will.

The testator made no new will or codicil, and plainly thought the day before he died that his will was in force.

The evidence, falling short of proving any agreement to make a will in any particular way, discloses good ground in justice and in morals for upholding the will.

Action dismissed with costs.

The plaintiffs appealed from this decision, and their appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and LOUNT, JJ., on the 19th and 20th February, 1901.

C. Robinson, K.C., *H. J. Scott*, K.C., and *H. O'Brien*, K.C., for the plaintiffs. The case is very plain. The testator and his wife were not deprived of life at the same time, for sixteen days intervened between their deaths. It may be conceded that if their deaths had occurred from the same cause or as part of the one transaction, although with an interval between, they would have died at the same time within the meaning of the will. Justice and morals have nothing to do with the case. It is inconceivable that, under the circumstances in evidence, they should be said to have died at the same time. Authorities are not near the case, but these may be referred to: *In re Pollard's Estate* (1863), 3 De G. J. & S. 541; *Mason v. Robinson* (1825), 2 Sim. & Stu. 295; *Jarman on Wills*, 5th ed., p. 1655.

Aylesworth, K.C., *A. S. Ball*, and *T. T. Rolph*, for the defendants the executors and the defendants *Ball*, *C. I. Maclean*, and *MacTavish*. This is not a case of construction of a will in the ordinary sense. Revocation of the probate is not formally asked, though that is what the plaintiffs are really seeking. The plaintiff *John Henning* at least should have objected to probate being granted, but, instead of that, he acquiesced and took benefits under the will for eleven years. The testator's use of the phrase which has given rise to this action was simply an awkward way of providing for the event of his surviving his wife or of them both dying at the same time. It was as if he had said, "if we both should be dead at the same time." "By accident or otherwise:" these words do not convey the idea that "otherwise" is to be *ejusdem generis* as "accident." Just the opposite; by accident, or otherwise, not by accident: *Lowther v. Bentinck* (1874), L.R. 19 Eq. 166; *Cordingley v. Cheesebrough* (1862), 3 Giff. 496, 4 De G. F. & J. 379; *In re Terry and White's Contract* (1886), 32 Ch. D. 14. The testator could not have supposed that they would have died of ordinary illness at exactly the same moment, but what he must have had in mind actually happened—they were both on their death-beds at the same time. Evidence of what he said is admissible. What is clearly a mistake will be rejected: *Marklew v. Turner* (1900), 17 Times L.R. 10. As to the meaning of "at the same time:" *Chapman v. Robinson* (1858), 1 E. & E. 25. As to meaning of "at," see *Murray's New English Dictionary*, *sub verb.*, 29b. The Court leans against an intestacy: *Beale's Legal Interpretation*, p. 233. The executors acted honestly and reasonably and are protected by R.S.O. 1897 ch. 131, secs. 1, 2; 62 Vict., 2nd sess., ch. 15 (O.) There was a republication of the will on the testator's death-bed.

W. Mortimer Clark, K.C., for the defendants *Knox College* and the *Presbyterian Church in Canada*. "Accident" means anything unexpected: see the *Standard Dictionary*. These deaths were accidents in that view. The deaths occurred at the same time, giving a reasonable meaning to the will, as found by the trial Judge.

W. T. J. Lee, for the defendant *Clara Henning*, who was added at the trial, objected to the letters admitted as evidence

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at the trial, she not having consented. She was an infant two years ago, and the statute of limitations could not run against her.

Scott, in reply. It is not necessary to revoke the probate; this Court has jurisdiction notwithstanding the probate. But at any rate this is not a contingent will; it is a will which must be admitted to probate: *Parsons v. Lanoe* (1748), 1 Ves. Sen. 189. As to the executors, it was their duty to get the opinion of the Court or take the advice of counsel.

July 17. MEREDITH, C.J.:—Appeal by the plaintiffs from the judgment pronounced by the Chief Justice of the King's Bench on the 19th November, 1900, after the trial of the action before him without a jury, at Toronto, dismissing the action with costs.

The testator, Thomas Henning, made his will on the 10th June, 1887.

By the first paragraph of it he gave and bequeathed to his wife Isabella all his estate real and personal, and appointed her his executrix.

Then follow the provisions upon which the contest between the parties to this action has arisen.

Nothing turns upon these provisions rendering it necessary to refer to them in detail, the sole question being whether they ever took effect.

The solution of that question turns upon the meaning of the second paragraph of the will, which reads as follows:—

“In case both my wife and myself should by accident or otherwise be deprived of life at the same time I request the following disposition to be made of my property.”

The testator and his wife shortly after the will was made went to Europe, and both of them died in Italy, the wife on the 11th December, 1888, and the testator on the 27th of the same month. The wife was taken ill on the 8th December, and died very suddenly. The husband was taken ill on the 9th December, and his illness was very much aggravated by the shock of his wife's sudden death, and its fatal termination was probably due to that cause.

The learned Chief Justice was of opinion that the words "at the same time" were not to be read as meaning "at the same moment," but, as he put it, as "practically at the same time," and, having regard to the circumstances attending the illness of the husband and wife and their deaths, he came to the conclusion that the husband was in a moribund condition from the time of his wife's death, and therefore that "they were both deprived of life at the same time, in the reasonable and practical intentment of the will."

I am unable to concur in that view, which I venture to think does violence to the language which the testator has used. The observations of Lord Macnaghten in *VanGrutten v. Foxwell*, [1897] A.C. 658, at p. 678, are apposite, and I quote them:

"When you can give effect to every word, attributing to each expression its proper legal signification, and the result, though perhaps unexpected or unusual, is not irrational or absurd, I do not think you ought to approach the construction of the will with the idea that the testator probably did not mean what he has said."

How it can be said that the testator and his wife were deprived of life at the same time, when sixteen days elapsed between the earlier and the later death, and they were not the result of a common accident or other catastrophe, but due to ordinary disease, with great respect, I cannot understand.

It is quite possible that in drawing his will the testator's mind being directed to the possibility of an accident happening to his wife and himself by which they should meet death together, he had not in contemplation their dying as the result of disease, but whether that is so or not is mere conjecture, and we have no right, I think, to say that, when he made the taking effect of the alternative provisions of his will contingent on his wife and himself, by accident or otherwise, being deprived of life at the same time, he did not mean what, according to its natural and ordinary signification, is the import of the language which he used. To search for another or a different meaning for his words is to fall into the error which Lord Macnaghten pointed out in the passage of his speech to which reference has been made.

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There is nothing irrational or absurd in the provision that the alternative dispositions of the will should take effect only in the event of the testator and his wife being deprived of life at the same time, even if the words "at the same time" be read as meaning without any interval of time elapsing between the death of one and that of the other. In the case of *In the Goods of Hugo* (1877), 2 P.D. 73, a husband and wife made a joint will which was to take effect only in the event of the death of both happening at one and the same time from one and the same accident, and it does not appear to have occurred to any one that there was anything irrational or absurd in that provision.

I am, therefore, of opinion that the alternative provisions of the will never took effect, and that, subject to the qualifications which I shall afterwards mention, the respondents Maclean and Brown are liable to the next-of-kin of the deceased for the estate which came to their hands.

The appointment of the respondents Maclean and Brown as executors of the will never took effect, because their appointment depended upon the same contingency as was applicable to the other alternative provisions of the will, but, having applied for and obtained probate, they became, I think, trustees for the persons entitled beneficially to the estate of the deceased.

The payments made by them to those who would have been beneficially entitled had the alternative provisions of the will taken effect were breaches of trust, but the statute of limitations is a bar to a recovery in respect of any of these breaches which occurred more than six years before the action was brought: R.S.O. 1897 ch. 129, sec. 32: the defendants Maclean and Brown, however, seek to be relieved from personal liability for all breaches of trust committed by them, under the powers conferred on the Court by the Act passed in the 62nd year of Her late Majesty's reign (2nd session) and chaptered 15, intituled "An Act to Amend the Law Respecting the Liability of Trustees;" and I am of opinion that they are entitled to that relief.

That in assuming that the alternative provisions of the will took effect they acted honestly is admitted, and I think that they also acted reasonably within the meaning of the Act. The

Surrogate Court granted probate of the will to them. Its meaning and true construction are certainly doubtful. A distinguished Judge came to the same conclusion as to its effect as that to which these defendants came, and for twelve years everybody interested in the estate seems to have concurred in their view. It appears to me that in these circumstances the proper conclusion is, that they acted reasonably, and ought therefore fairly to be excused for the breaches of trust committed by them and for omitting to obtain the directions of the Court in the matter in which they committed such breaches.

The appeal must, therefore, be allowed and the judgment appealed from reversed, and instead thereof judgment be entered declaring that in the events that have happened the provisions of the will did not take effect.

If the appellants desire a reference to take an account of the trust moneys in the hands of the defendants Maclean and Brown and an order for payment into Court of those moneys, the judgment may contain such a reference and order; and the costs of all parties will be paid out of the trust estate.

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Trade-mark—Descriptive Letters—Registration—Secondary Meaning—Proof of Acquisition of—Fraud—Deception.

The letters C.A.P., standing for the words "cream acid phosphates," being descriptive merely, are not the proper subject of a trade-mark, and registration of them as a trade-mark, under the Trade-Mark and Design Act, will not give a right to the exclusive use of them.

Partlo v. Todd (1888), 17 S.C.R. 196, followed.

Words or letters which are primarily merely descriptive may come to have in the trade a secondary meaning signifying to persons dealing in the articles described that when branded with such words or letters the articles are of the manufacture of a particular person.

But where the plaintiffs used the letters C.A.P., standing for "cream acid phosphates," in connection with acid phosphates manufactured by them, and the defendants used the same letters, signifying "calcium acid phosphates," in connection with acid phosphates manufactured by them, and prominently stated thereon to be manufactured by them, and the evidence did not shew that there was on the part of the defendants any fraud, or any intention of appropriating any part of the plaintiffs' trade, or that any purchaser or person invited to purchase was deceived or misled, or that the letters had come to mean in the trade, acid phosphates of the plaintiffs' manufacture :—*Held*, that the plaintiffs could not complain of the use of the letters by the defendants.

Reddaway v. Banham, [1896] A.C. 199, applied.

AN action for an injunction and damages and other relief in respect of the alleged infringement by the defendants of a trade-mark registered by the plaintiffs. The facts and arguments are fully stated in the judgment.

The action was tried before MEREDITH, C.J.C.P., at London, on the 3rd June, 1901.

W. Cassels, K.C., and *H. Cronyn*, for the plaintiffs, cited *Smith v. Fair* (1887), 14 O.R. 729; *Radam v. Shaw* (1897), 28 O.R. 612; *McCall v. Theal* (1880), 28 Gr. 48; *Partlo v. Todd* (1887), 14 A.R. 444, (1888), 17 S.C.R. 196; *Davis v. Reid* (1870), 17 Gr. 69; *Montgomery v. Thompson*, [1891] A.C. 217; *Wotherspoon v. Currie* (1872), L.R. 5 H.L. 508; *Reddaway v. Banham*, [1896] A.C. 199; *Saxlehner v. Apollinaris Co.*, [1897] 1 Ch. 893; *Edwards v. Dennis* (1885), 30 Ch. D. 454; *Field v. Wagel Syndicate*, [1900] 1 Ch. 651.

G. F. Shepley, K.C., and *E. W. M. Flock*, for the defendants, referred to *Parsons v. Gillespie*, [1898] A.C. 239; *Cellular*

Clothing Co. v. Maxton, [1899] A.C. 326; *Amoskeag Manufacturing Co. v. Trainer* (1879), 17 U.S. Patent Office Gazette (1880) p. 1217; *Canal Co. v. Clark* (1871), 13 Wall. (U.S.) 311; *Amoskeag Manufacturing Co. v. Spear* (1849), 2 Sandf. (N.Y.) 599; *Eggers v. Hink* (1883), 63 Cal. 445.

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July 24. MEREDITH, C.J.:—The plaintiffs are a manufacturing company having their head office and manufactory at St. Louis, in the State of Missouri, one of the United States of America.

Acid phosphates is one of the articles which the plaintiffs manufacture, and it is manufactured in large quantities and a market for it is found both in the United States and in Canada, as well as elsewhere.

The plaintiffs have for many years manufactured acid phosphates which they designate “cream acid phosphates,” and upon the packages in which it is put up for sale and sold are stamped the letters C.A.P., which are said to have been used as the initial letters of the words “cream acid phosphates.”

These letters the plaintiffs have registered as their trade-mark, in the United States on the 21st September, 1886, and in Canada on the 24th July, 1900. Their name and place of business also formed part of the trade-mark so registered.

The defendants are a manufacturing company, and have for many years carried on business at London, in this Province; about nine years ago they commenced the manufacture of acid phosphates as a branch of their business for the purpose of utilizing one of the bi-products in the manufacture of sulphuric acid, the manufacture of which forms their principal business.

Calcuim is, as I understand, one of the ingredients of the acid phosphates manufactured by the plaintiffs and by the defendants.

The defendants for several years have used in connection with the acid phosphates manufactured by them the letters C.A.P., branding them upon the packages in which it is put up for sale, and advertising it under those letters; the letters being intended to signify calcium acid phosphates.

Calcium acid phosphates is a proper as well as a scientifically correct designation for the acid phosphates manufactured by the

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defendants, though the word "calcium" is used perhaps more frequently after than before the other two words—acid phosphates of calcium.

It was not contended that the defendants in adopting and applying to the product of their manufacture the letters C.A.P. had in fact any intention to put off their goods as the goods manufactured and sold by the plaintiffs under that brand; had it been so contended, the contention would not have been supported by the evidence, for the contrary is satisfactorily shewn.

The plaintiffs' case is, however, that the letters C.A.P., though primarily, perhaps, descriptive of the article to which they were applied, have acquired a secondary meaning, and have come to be known and recognized in the trade as indicating the specific article manufactured by them and sold under that brand—cream acid phosphates—and that the defendants have no right to apply those letters to the acid phosphates which they manufacture, because, as they contend, the result of their so doing is, that those dealing in the article are likely to be misled into thinking that the goods of the defendants so branded are the specific article manufactured by the plaintiffs and sold under the same brand; and they also claim that they are proprietors of the registered trade-mark to which I have referred, and therefore entitled to the exclusive use of the letters C.A.P. as applied to the article of acid phosphates.

The relief claimed by the plaintiffs based on these alleged rights is an injunction restraining the defendants from using the letters C.A.P. in connection with any baking powder material not manufactured by the plaintiffs, and from using them so as to induce the belief that the material manufactured or sold by the defendants is the same as that manufactured and sold by the plaintiffs, and from in any way infringing the plaintiffs' alleged trade-mark; they also claim damages and an order for the obliteration of the letters C.A.P. wherever they are used by the defendants in connection with their acid phosphates, and for the destruction of any dies or other instruments for stamping or marking those letters, in the possession of the defendants.

I purpose dealing first with the claim as far as it is based on the plaintiffs' rights as owners of the trade-mark and therefore

to the exclusive use of the letters C.A.P. when applied to any material for making baking powder.

It is clear, I think, that primarily the letters C.A.P., standing as they do for the words "cream acid phosphates" or "calcium acid phosphates," are descriptive merely, and are not therefore the proper subject of a trade-mark.

As Mr. Justice Burton pointed out in *Partlo v. Todd*, 14 A.R. 444, at p. 452, a word or name which is merely descriptive of an article, or which is indicative merely of its quality or composition, cannot properly be the subject of a trade-mark. That, I take it, is a correct statement of the law, and it is conclusive against the plaintiffs on this branch of the case, unless by the registration of the letters under the Trade-Mark and Design Act as a trade-mark they have acquired a right to the use of them which the defendants are not entitled to question in this action. If the decision of the Supreme Court in *Partlo v. Todd*, 17 S.C.R. 196, is still the law, the registration does not help the plaintiffs. That was conceded by Mr. Cassels, but he contended that the decision proceeded upon the ground that there was no machinery provided by the Act for expunging from the register a trade-mark improperly admitted to registration, and no longer governed because, by subsequent legislation, jurisdiction is given to the Exchequer Court, at the suit of any one aggrieved by an entry in the register of trade-marks without sufficient cause, to make an order expunging or varying the entry as the Court thinks fit.

This contention is not, I think, well founded, for, as I read the report of the case, the judgment of the Court did not proceed upon the ground upon which Mr. Cassels argued that it was rested, but upon broader grounds. The head-note to the report lends colour to the argument, but it is not warranted by anything which is found in the judgment, and I must, therefore, follow *Partlo v. Todd*, and, following it, hold that it is open to the defendants in this action to raise and rely on the objection to the plaintiffs' claim which is, in my opinion, fatal to it, that at the time of the registration the plaintiffs were not proprietors of the trade-mark because the letters C.A.P. were not, for the reasons I have already mentioned, the subject of a trade-mark.

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I come now to the other branch of the case.

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In *Reddaway v. Banham*, [1896] A.C. 199, the House of Lords, after a full review of the authorities, laid down the law which is to be applied in determining as to the right of one who is not the owner of a trade-mark in respect of them to restrain another from using names, marks, letters, or other indicia which the former has applied to articles put upon the market by him.

As put by the Lord Chancellor (p. 204) the principle of law to be applied is, that nobody has any right to represent his goods as the goods of somebody else, and, as said by Lord Herschell (p. 209), it is that stated by Lord Kingsdown in these words: "The fundamental rule is, that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot therefore (in the language of Lord Langdale in *Perry v. Truefitt* (1842), 6 Beav. 66) be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person."

It seems to have been conceded on all hands that that principle has no application where the names, marks, letters, or other indicia are descriptive of the material of which the article is composed or of its quality or nature—as if in that case the words "camel hair" conveyed to persons dealing in belting the idea that it was made of camel hair—but that it was to be applied where the names, marks, letters, or other indicia, though primarily they conveyed that meaning, had come to have a secondary meaning and to be understood in the trade to mean, when applied to an article, that it was one manufactured by the person who was known to have applied them to such an article of his manufacture.

To apply, then, the principle of that case to the facts of this. There can, I think, be no question, as I have said already, that the letters C.A.P. as used by the plaintiffs were merely descriptive of the article phosphates, and unless, therefore, they had come to have in the trade a secondary meaning and to be no longer merely descriptive, but to signify to persons dealing in acid phosphates that acid phosphates so branded were of the plaintiffs' manufacture, there was nothing to prevent the defendants from applying to acid phosphates manufactured by them

the name of "calcium acid phosphates" or the letters C.A.P. as being the initial letters of those three words and standing in place of them.

As I have said, there is no case made on the evidence of fraud on the defendants' part, and no ground for thinking that in using the letters C.A.P. they did not do so simply because they stood for the words "calcium acid phosphates," and without any idea or intention of appropriating to themselves any part of the plaintiffs' trade. Nor is there any pretence for saying that any one who has purchased their goods bearing the brand C.A.P., or any one who was invited by advertisement or otherwise to do so, was deceived or led by the use of the letters to believe that what he was purchasing or invited to purchase was the article which the plaintiffs manufactured and sold under that brand.

The evidence does not satisfy me that the letters C.A.P. used by the plaintiffs in connection with acid phosphates manufactured by them have acquired a secondary meaning, or have come to mean in the trade acid phosphates of the plaintiffs' manufacture, or that those words were understood in the trade otherwise than as descriptive of the article simply.

Acid phosphates are not sold either by the plaintiffs or the defendants by retail, but only, as I understand the evidence, to manufacturers of baking powder, who in ordering it are in the habit of doing so calling the article "acid phosphates," and not by the name either of "cream acid phosphates" or of "calcium acid phosphates." Mr. Fullerton, one of the witnesses examined on behalf of the plaintiffs, who had purchased both from them and from the defendants, testified that he called the article indifferently by the two names "C.A.P." and "phosphates" simply. The evidence also shews that it was customary in the trade to designate other articles used in the manufacture of baking powder by the initial letters of the words descriptive of them, as B.C.T. to signify baker's cream of tartar, and C.T.S., cream of tartar substitute, and the like. This is important, I think, as indicating that persons in the trade would understand the letters C.A.P. to mean cream acid phosphates or calcium acid phosphates according as they purchased from the plaintiffs or from the defendants; in other words, they would know, if they

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were buying acid phosphates from the plaintiffs, that it was of the grade called by them cream acid phosphates, and if from the defendants, that called by them calcium acid phosphates.

But, even if the letters C.A.P. have acquired the secondary meaning I have spoken of, something more is required to be shewn by the plaintiffs to entitle them to the relief they seek. It is only—even in that case—if the use which the defendants make of the letters is calculated to deceive persons in the trade into the belief that the article purchased from the defendants under that brand is the article manufactured and sold by the plaintiffs under the same brand, that the acts of the defendants are a violation of the rights of the plaintiffs.

I quote from the speech of Lord Morris in the *Reddaway* case. After expressing his concurrence with the judgment of the House, he proceeds—referring to the finding of the jury that camel hair belting had become so identified with the name of the plaintiff as that camel hair belting had in the market obtained the meaning of Reddaway's (the plaintiff's) belting—as follows: "That finding establishes as a fact that the use of the words 'camel hair belting' simpliciter deceives purchasers, and it becomes necessary for the respondents to remove that false impression so made on the public. That, to my mind, is obviously done when the respondents put prominently and in a conspicuous place on the article the statement that it was camel hair belting manufactured by themselves. Having done so, they would, as it appears to me, fully apprise purchasers that it was not Reddaway's make, by stating that it was their own. A representation deceiving the public is and must be the foundation of the appellants' right to recover; they are not entitled to any monopoly of the name 'camel hair belting' irrespective of its deceiving the public, and everyone has a right to describe truly his article by that name, provided he distinguishes it from the appellants' make. In this case the respondents did not so distinguish it because they omitted to state that it was their own make." [1896] A.C. pp. 221-2.

That statement of Lord Morris, if I may venture to say so, appears to me to crystallize into a few words the whole case

and to properly state the rule to be applied and the limits of its application.

If, then, it was open to the respondents in that case—what they had done having been fraudulently designed with intent to deceive, and having had that effect—to set themselves right by adopting the course pointed out by Lord Morris, it is an *à fortiori* case that these respondents, who have not acted fraudulently—have not intended to deceive and have not in fact deceived any one into the belief that in buying goods of their manufacture he was buying the plaintiffs' goods—and have taken care to put prominently on the articles of their manufacture the statement that they were manufactured by them—have not represented their goods as the goods of the plaintiffs, nor by the use of the letters C.A.P. put off their goods for sale as the goods of the plaintiffs—have committed no wrong for which the plaintiffs are entitled to call them to account.

Had I been of a different opinion, it would have been necessary to consider the effect of the laches and delay of the plaintiffs in taking proceedings to assert their rights against the defendants, but, as it is, I need not consider that question.

I have not referred to any of the cases cited upon the argument but the two I have dealt with, because the general question with which I have had to deal is so fully dealt with in the *Reddaway* case, and because the American cases cited by Mr. Shepley are not altogether in accord with the view taken by the English Courts as to the application of the rule laid down in *Re Reddaway* to cases where the names, words, letters, or other indicia used are descriptive merely of the article or indicative merely of its quality or composition.

The result is that, in my opinion, the plaintiffs' case fails, and their action must be dismissed with costs.

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July 24.

MACLAUGHLIN ET AL. V. LAKE ERIE AND DETROIT RIVER
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Patent for Invention—Contract—Grant—License—Revocation—Right to Manufacture—Changes in Article Manufactured—Reformation of Contract.

The plaintiff, the inventor and patentee of improvements in automatic air brakes, made an agreement in writing with the defendants, a railway company, by which he granted to them the license and right to use the invention and to equip their rolling stock in whole or in part therewith during the term of the patent, and agreed to supply them with the air brake and all necessary equipment up to 5,000 sets, and to make all repairs to brakes and equipments so supplied, at the actual first cost plus 15 per cent. upon such cost, to be paid by the defendants. The defendants were not to pay anything for the right, the main consideration to the plaintiff for the grant being the advertisement which his invention would get:—

Held, that this agreement did not operate as a license revocable at the will of the plaintiff, but as a grant of a right in respect of the invention, containing reciprocal obligations on the part of the grantor and grantees.

Guyot v. Thomson (1894), 11 R.P.C. 541, followed.

Semble (assuming that there was a revocable license), that an assignment of the patent by the plaintiff, after an action had been begun by him to restrain the defendants from infringing the patent, did not revoke such license.

Held, also, that the agreement conferred upon the railway company the right to manufacture the patented brakes which they were entitled under the agreement to use upon their railway; and the plaintiff was not entitled, upon the evidence, to have the agreement reformed so as to take away that right.

Steam Stone Cutter Co. v. Shortsleeves (1879), 4 Ban. & Ard. 364, and *Illingworth v. Spaulding* (1890), 43 Fed. Rep. 827, approved.

But the agreement did not justify the making by the defendants of certain important changes in the mode of construction of the brake and in using the brake so altered, especially if they were using and claiming to use it as the plaintiff's invention, and so describing it.

THIS was an action to restrain the defendants from infringing a patented right and for other relief. The facts appear in a report of an interlocutory motion in the same action (*ante* 151) and in the present judgment.

The action was tried before MEREDITH, C.J.C.P., without a jury, at Sandwich, on the 17th June, 1901.

J. H. Rodd, for the plaintiffs.

A. W. Anglin, for the defendants.

July 24. MEREDITH, C.J.:—The plaintiff MacLaughlin is the inventor of improvements in automatic air brakes for which he obtained letters patent on the 23rd July, 1900.

He was desirous of getting his invention into use on a Canadian railway, and began negotiations to that end with the

Grand Trunk Railway Company of Canada, but these negotiations came to nothing. The defendants, having heard of the invention, got themselves into communication with MacLaughlin, with the result that, having satisfied themselves by experiment and trial that the invention was an improvement on the automatic air brakes commonly in use, both on account of its greater simplicity of construction and operation and its being capable of being produced at less cost, they entered into an agreement with MacLaughlin for the purpose of obtaining the right to use his invention on their railway.

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The agreement was reduced to writing, and is as follows :

“ Know all men by these presents that I, William Gordon MacLaughlin, of Kansas City, in the State of Missouri, one of the United States of America, manufacturer, patentee, and owner of the Canadian patent (No. 68185) of the MacLaughlin Automatic Air Brake, for divers good and valuable considerations now received by me from the Lake Erie and Detroit River Railway Company,

DO HEREBY GRANT to the said Lake Erie and Detroit River Railway Company, and their successors, the license and right to use the said invention and to equip their rolling stock in whole or in part with the same, for and during the term of the said patent.

AND I FURTHER AGREE, for the considerations aforesaid, from time to time, as may be required by said railway company, to supply the said railway company and their successors with said air brake and all necessary equipment up to 5,000 sets, and to make and do all repairs to brakes and equipment so supplied, at the actual first cost plus fifteen (15) per cent. upon such cost to be paid to me by the said railway company: the said railway company also to pay the cost of freight and carriage from or to the manufactory.

AND WHEREAS I am organizing a joint stock company in Canada for the purpose of acquiring said patent and manufacturing and selling the said brake,

NOW THESE PRESENTS FURTHER WITNESS that I, the said MacLaughlin, covenant, promise, and agree with the said

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railway company that the said proposed company when incorporated shall execute and deliver to the railway company a license and agreement sufficient to confirm and assure to the railway company and their successors the rights and privileges hereby given or intended so to be.

AND I HEREBY DECLARE that this license shall be deemed to extend to and include any and every renewal or renewals, amendment or substitutions, of or for the said patent, and all improvements thereon hereafter acquired by me or the proposed company, or my or their heirs, executors, administrators, or assigns.

IN WITNESS, etc."

Admittedly the defendants were not to pay anything for the right which was intended to be granted to them; the benefit which MacLaughlin would derive from his invention being in use on the defendants' railway, and the advertisement which his invention would get from that use, being the main consideration to him for the grant which he was making.

Three cars of the defendants were equipped by MacLaughlin with his air brake before the agreement was made, and eight or ten after it.

The defendants after the agreement made changes in the Westinghouse brakes with which the cars on their railway were equipped, so as to convert them into brakes constructed according to the MacLaughlin patent.

The defendants' mechanical superintendent (one Austin) and a man named Wilson, who, I take it, was an employee of theirs, after the agreement set about making changes in the manner of constructing the air brake, altering the mode of construction in important respects until they had made what they deemed to be an improved air brake for which they were entitled to obtain letters patent, and, to the knowledge of the defendants, they came to the conclusion to apply for a patent for this air brake of theirs and to obtain a patent for it, if one could be obtained.

Some of the defendants' cars were, to their knowledge, equipped with this air brake of Austin and Wilson, and before

action the defendants, though applied to by MacLaughlin's solicitors, refused to discontinue the use of these brakes.

The air brakes supplied by MacLaughlin to the defendants or some of them were altered so as to conform to the design and mode of construction which Austin and Wilson had adopted, and as altered were used by the defendants on their railway.

This action was begun on the 24th January, 1901, and the object of it is, as appears from the claim made in the pleadings, to prevent the defendants infringing the plaintiff's patent by using or permitting to be used in connection with their engines, cabs, cars, and coaches an altered form of the plaintiff's brake which is an imitation of it or an infringement thereon, and from, as the language of the claim is, "permitting it to be used on the said engines, cabs, cars, and coaches for the purpose of exploiting under an infringing brake and from masquerading any other brake under the name of the said inventor."

The defendants plead the agreement with MacLaughlin, and claim that all that they have done is authorized by it, and they admit expressly that any alterations made by them in the air brakes furnished to them by MacLaughlin were covered by his patented invention and are part of the invention claimed by him.

The plaintiffs by their reply join issue on the statement of defence and say that the agreement does not authorize what the defendants have done, but, if it does, they ask to have the agreement reformed, because, as they say, it does not correctly set forth the true contract between MacLaughlin and the defendants, and they say also that the agreement is not binding on the plaintiff company.

MacLaughlin, on the 19th February, 1901, assigned to the plaintiff company his patent, and the plaintiff company was thereupon added as a co-plaintiff with him.

At the trial the defendants contended that they were entitled under their agreement with MacLaughlin to manufacture such and so many of the air brakes as they might require for use on their railway, as well as to use them, and that they were also entitled to use the whole or any part of MacLaughlin's invention separately or in conjunction with any other device or

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mode of construction which they might choose to adopt, and that everything that they had done was authorized by the agreement, which was a complete answer to the plaintiffs' claim, and they also insisted that no case was made for reforming the agreement, which, they said, correctly set forth the bargain between MacLaughlin and them.

The plaintiffs, on the other hand, alleged that, even if the agreement was a valid and binding one, it did not authorize the defendants to manufacture MacLaughlin's invention, but only to use it after they had procured the brakes from MacLaughlin, or some one authorized by him to supply them, and that, even if this were not so, if the defendants chose to equip their rolling stock with MacLaughlin's invention, they must use a brake made in accordance with his patent, and were not entitled to make the changes which they had made and to use the altered brake.

They also contended that the agreement was a license and revocable, and that it had been revoked by the assignment from MacLaughlin to the plaintiff company, and that if, according to its true construction, the right to manufacture was granted, it was by mutual mistake, and that the writing should be reformed so as to make it express the true agreement between MacLaughlin and the defendants.

No case is, in my opinion, made out for reformation of the writing. I do not doubt that MacLaughlin, as he testified, believed that the agreement did not confer upon the defendants the right to manufacture the brakes which they were to be entitled to use on their railway except so far as that might be done in converting the Westinghouse brakes which they were using into brakes according to his patent, but that is not enough to entitle the plaintiffs to have the writing reformed—the defendants deny that they so understood the bargain, and that being the case, it is impossible for the plaintiffs to succeed on that branch of their case.

Nor does the agreement, in my opinion, amount to a license revocable at the will of MacLaughlin. It is, I think, a grant of a right in respect of the invention containing reciprocal obligations on the part of the grantor and grantees—the obligation of the grantor to supply the 5,000 brakes at the price named

and that of the grantees to pay for them—and such a grant is not to be deemed a license revocable at the will of the person giving it: *Guyot v. Thomson* (1894), 11 R.P.C. 541. Had it been a license and revocable, the assignment to the plaintiff company of the patent, assuming it to have constituted a revocation, which, I think, it did not, having been made after action, could not avail for the purposes of this action.

The argument that the agreement does not confer upon the defendants the right to manufacture the patented brakes which they are entitled under the agreement to use upon their railway is not, in my opinion, well founded. I cannot see what purpose or object there was in giving the defendants the right to use the invention on their railway if they were to have the right only to use such brakes as they might purchase or otherwise acquire from the patentee or some one having his authority to supply them. The contract, if that had been the intention, would have provided simply that the patentee was to supply on agreed terms to the defendants such air brakes as they might require for use on their railway. I refer to the cases of *Steam Stone Cutter Co. v. Shortsleeves* (1879), 4 Ban. & Ard. 364; *Illingworth v. Spaulding* (1890), 43 Fed. Rep. 827. The reasoning on which these cases were decided commends itself to my mind, though one of the reasons assigned for the conclusions reached has perhaps not so much force in Canada because of the provisions of the Patent Act requiring that the patentee shall carry on the construction or manufacture of the invention patented so that any person desiring to use it may obtain it or cause it to be made for him at a reasonable price at some manufactory or establishment in Canada: 53 Vict. ch. 13, sec. 2 (D.)

I am, however, of opinion that, having regard to the circumstances of this case, the agreement did not authorize or justify the defendants making the changes in the mode of construction of the brake which were made by them and their use of the altered brake, especially if, as I understand, they were using and claiming to use it as MacLaughlin's invention and so describing it. I do not mean to say that a licensee, if his license does not indicate any thing to the contrary, may not be at liberty to make such changes as he pleases—to adopt in

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the manufacture of the patented article or thing the whole or such parts of the licensed invention as he may see fit—in other words, that, within the limits, if any, assigned by the license, he is not in the same position towards the patentee as far as using his invention is concerned as if no patent existed, and entitled to do anything and everything which if done by another not licensed to do it would amount to an infringement of the patented rights.

It is, however, unnecessary to decide as to that, for, looking at the terms of the agreement in question, and having regard to the admitted purpose and object of MacLaughlin in conferring, without any money consideration, the rights which are conferred by the agreement, it seems to me reasonably plain that it was intended that the brakes which the defendants should be entitled to use were to be brakes manufactured according to MacLaughlin's patent, and not that they should be at liberty to make such changes as they saw fit in the manner of constructing the brake and then to use the changed thing.

I do not mean to include minor changes in matters of mere detail which would still leave the brake one constructed in substantial conformity with MacLaughlin's invention.

If it were otherwise, the whole object which MacLaughlin had in entering into the agreement would, as it appears to me, be frustrated. Of what use would it be to him as an advertisement for his invention that the defendants were using something which, though according to patent law it was substantially the same, so differed in appearance and mode of construction as to appear to be another and a different brake, and how would the fact that the defendants were using such a brake assist MacLaughlin in selling his brake or rights under his patent?

It was said that the changes made by Austin and Wilson in the brake supplied by MacLaughlin were not important changes, and did not constitute a patentable improvement on MacLaughlin's brake. It is all very well for the defendants to say that now, in order to defeat the plaintiffs' claim, but it is not the position taken by Austin and Wilson, who appear to have thought the change so important that they intended to apply for a patent for it, and that it was of that character was,

I think, the position taken by the defendants down to the time when they filed their statement of defence.

If, as I understand the facts to be, the defendants were using the altered brake under the name of MacLaughlin and his patent, that affords an additional reason for holding that their acts which are now in question were unauthorized and an infringement of the plaintiffs' rights.

There is nothing, I think, in the contention that the plaintiff company is not bound by the agreement, for it had notice of the agreement, and cannot be heard to say that it is not bound by it.

Upon the whole, I am of opinion that the plaintiffs are entitled to the relief claimed in their pleading, and there will, therefore, be judgment awarding it with costs. There will, however, in drawing up the judgment, be eliminated the words "for the purpose of exploiting under an infringing brake and masquerading any other brake under the name of the said inventor," which appear in that part of the claim which I have quoted, the meaning of which, I confess, I do not understand, and which are in any case unnecessary to be added.

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July 23.

VANLUVEN V. ALLISON.

Will—Construction—Devise—Estate in Fee—"Leaving no Children"—Divesting—Executory Devise over—Contrary Intention—Vendor and Purchaser—Doubtful Title—Specific Performance.

A testator by his will gave his widow a life estate in land, and then devised it to his son Philip and his lawful heirs and assigns, and then, after devising certain other property to another son, he continued: "I also give, devise, and direct, should any of my sons *die leaving no children*, the property bequeathed to said son shall be equally divided between all my children, sons and daughters and grand-daughters aforesaid, share and share alike. . . . Should any of my children be disposed to sell any part or the whole of the property bequeathed to them, I desire and direct that they give the preference or refusal to one of the family . . ."

The testator died in 1878, leaving him surviving his widow, who died in 1898, three sons, Philip being one, and four daughters. At the time of the testator's death Philip was married and had two children. In 1891 the widow and Philip made a conveyance of the land devised to him, under which the plaintiff claimed. At the time of this action Philip and his children were still living :—

Held, that the estate in fee in Philip was subject to being divested by his dying, "leaving no children," which might still happen, and in which event the executory devise over would take effect.

The fourth rule laid down in *Edwards v. Edwards* (1852), 15 Beav. 357, is overruled by *O'Mahoney v. Burdett* (1874), L.R. 7 H.L. 388, and the rule now is, that when there is a gift over in the event of death without issue, that direction must be held to mean death without issue at any time, unless a contrary intention appears in the will, and that the introduction of a previous life estate does not alter that principle of construction.

Olivant v. Wright (1875), 1 Ch. D. 346, followed.

Held, also, that the provision in the will as to any of the children of the testator being "disposed to sell" did not shew a "contrary intention."

Held, also, that a "contrary intention" was not indicated by a devise in the same will to another son subject to the same limitation and conditions, but subject also to the payment of legacies of \$2,000 at the expiration of two years from the testator's death—which appeared to be inconsistent with anything short of an absolute estate in fee.

Cowan v. Allen (1896), 26 S.C.R. 292, followed.

Held, therefore, that the plaintiff's title was not one that could be forced upon an unwilling purchaser, and a decree for specific performance should be refused.

ACTION for specific performance of a contract for the sale and purchase of land, tried before LOUNT, J., without a jury, at Kingston, on the 21st June, 1901. The facts appear in the judgment.

G. M. Macdonnell, K.C., for the plaintiff.

E. H. Smythe, K.C., and H. T. Lyon, for the defendant.

July 23. LOUNT, J. :—This action is brought to enforce the specific performance of an agreement in writing, dated the 1st

October, 1900, whereby the plaintiff agreed to sell to the defendant the east half of lot 28 in the 6th concession of the township of Kingston, in the county of Frontenac, for \$2,200. The defendant refuses to complete the purchase, alleging that the plaintiff has not a good title to the property. No other defence is raised on the pleadings, nor was any other relied on at the trial. I have, therefore, to determine the question as to the validity of the plaintiff's title, and whether, if a doubtful one, it should be forced upon the defendant, who is unwilling to accept.

The contention arises on the will of Philip Brewer, as it is conceded that the title, in other respects, is unobjectionable. The will is dated the 17th January, 1872, and by the first paragraph the testator gives to Elizabeth Brewer, his widow, a life estate in this property. By the 3rd paragraph he devises it to his son Philip Brewer and his lawful heirs and assigns, and by the 4th paragraph, after devising certain other property to another son, he says: "I also give, devise, and direct, should any of my sons die leaving no children, the property bequeathed to said son shall be equally divided between all my children, sons and daughters and granddaughters aforesaid, share and share alike:" and, further on, he says: "Should any of my children be disposed to sell any part or the whole of the property bequeathed to them, I desire and direct that they give the preference or refusal to one of the family, if they can agree regarding the sale and purchase, so that there be no advantage taken one of the other."

The plaintiff's title is derived by deed dated the 8th December, 1891, from Elizabeth Brewer and Philip Brewer, the son. The testator died in 1878, leaving him surviving his widow, who died in 1898, three sons, Philip being one, and four daughters, all of them mentioned in the will.

Philip, at the time of the death of the testator, was married and had two children; he and his children are now living.

The plaintiff contends, on the authority of the fourth rule laid down in *Edwards v. Edwards* (1852), 15 Beav. 357, at p. 364—"Where a life estate is given to one in the subject of the gift, and on the determination of that estate, the subject of it is given to A., with a direction that if he shall die leaving no child, his

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share shall go to the survivor . . . , the rule is, that these words, indicating death, without leaving a child, as the event on the occurrence of which the gift over is to take effect, must be construed to refer to the occurring of that event before the period of distribution"—and on the authority of *Clark v. Henry* (1871), L.R. 6 Ch. 588, *Besant v. Cox* (1877), 6 Ch. D. 604, *Olivant v. Wright* (1875), 1 Ch. D. 346, *Lewin v. Killey* (1888), 13 App. Cas. 783, Theobald on Wills, 4th ed., p. 532, and Jarman on Wills, 5th ed., p. 760—that, on the death of the testator or of the tenant for life, Philip took an estate in fee simple absolute; that the property then vested in him subject to no executory gift over; and, therefore, the deed from Philip and the tenant for life, who is now dead, put a good title in him (the plaintiff) which he is capable of transferring to the defendant.

The defendant argues that the estate in fee in Philip is subject to being divested by his dying "leaving no children," which, under the authority of *In re Booth*, *Pickard v. Booth*, [1900] 1 Ch. 768, means "die without a child or children living at his death;" that there is an executory gift over; and, although Philip and his children are now living, it is possible he may die leaving no children, in which event his estate will be divested, and will then vest in the other children and grandchildren, as provided in the will.

I am referred to a number of authorities by counsel for the defendant in support of this contention and shewing that the rule in *Edwards v. Edwards* no longer governs. I am of the opinion that the rule laid down in *Edwards v. Edwards* is overruled by *O'Mahoney v. Burdett* (1874), L.R. 7 H.L. 388, where it was held that "a gift to X. for life with remainder to A., and if A. dies unmarried or without children to B., is an executory gift over, which will defeat the absolute interest of A. in the event of A. dying, at any time, unmarried or without children." See, also, *Ingram v. Soutten* (1874), L.R. 7 H.L. 408. In *Olivant v. Wright*, 1 Ch. D. 346, James, L.J., at p. 348, says: "The Vice-Chancellor has, it appears to me, laid down accurately the rule that where there is a gift over in the event of death without issue, that direction must be held to mean death without issue at any time, unless a contrary intention

appears in the will; and that the introduction of a previous life estate does not alter that principle of construction. That rule was so laid down by the House of Lords in dealing with the case of *O'Mahoney v. Burdett*, and in dealing with the case of *Ingram v. Soutten*, where the Lord Justice and myself had thought that we ought to follow as a general rule the fourth canon of construction in the case of *Edwards v. Edwards*. . . . But the House of Lords appears to be of opinion that the rule was, in *Edwards v. Edwards*, laid down in terms too general, and that a gift over in the event of death without issue was to be construed in the same way, whether there was a tenancy for life or not. In every case these rules must be governed by the qualification which the Vice-Chancellor has introduced in this case, that is to say, unless a contrary intention appears in the will." See, also, *In re Parry and Daggs* (1885), 31 Ch. D. 130; *Cowan v. Allen* (1896), 26 S.C.R. 292; *Fraser v. Fraser* (1896), *ib.* 316; *Crawford v. Broddy* (1896), *ib.* 345.

Should this case be governed by the qualification that a contrary intention appears in the will? There is no doubt that the rule is subject to be controlled by the context. It is argued by the plaintiff that the effect of the devise and direction in the 4th paragraph—"and further, should my son be disposed to sell any part or the whole of the property bequeathed to him, I desire and direct that he give the preference or refusal to one of the family if they can agree regarding the sale and purchase so that there be no advantage taken one of the other"—is to destroy the executory gift over and give the estate in fee simple absolute to Philip. It is said the testator contemplated that Philip might be disposed to sell part or the whole of the property, and he intended to give him that power, provided that in such case one of the family should be given the preference of purchase. This, it is said, evidences the plain intention of the testator that Philip should have the estate in fee simple absolute with the right to sell and dispose of it at any time after the death of the tenant for life and subject to no executory gift over. Now is this the proper construction to place upon the language used? It may well be the testator intended his son should have the right to sell and dispose, but not to dispose of any other interest than such as he intended by the executory gift over, and if

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the son resolved to sell or dispose, then the other children should have the preference of buying such limited estate. Besides, the effect of this construction placed on these words would cut out of the will a limitation expressly placed there, and this should not be done except upon plain, clear, and certain language. I am of the opinion that the language is not plain and clear; it is ambiguous and uncertain and incapable of the construction contended for.

It is further argued that because of the devise to Benjamin W. Brewer, another son, of certain properties subject to the same limitation and conditions, but subject, also, to the payment of legacies of \$2,000, payable at the expiration of two years from the testator's death, the intention of the testator is made manifest that he intended an absolute estate in fee subject to no contingencies, for he could not have intended that Benjamin should pay off these legacies in two years and then by the happening of death immediately afterwards without children his estate should thereupon become divested. This argument was used in *Cowan v. Allen*, 26 S.C.R. 292, and disposed of by the learned Chief Justice, whose reasons I adopt as applicable here.

I think the plaintiff, having failed in making out a good title, a decree for specific performance must be refused. I am, moreover, of the opinion that the plaintiff's title is altogether too doubtful a one to warrant me in forcing it upon an unwilling purchaser. In *Alexander v. Mills* (1870), L.R. 6 Ch. 124, at p. 131, Sir W. M. James, L.J., says: "We do not say that there may not be cases in which a question of law may be considered so doubtful that a Court would not, on its own view, compel a purchaser to take a title; still, as a general and almost universal rule, the Court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined. The exceptions to this will probably be found to consist not in pure questions of legal principle, but in cases where the difficulty and the doubt arise in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument."

The will in this case was drawn by a man said to have been a carpenter—manifestly not a person having any knowledge or

skill in drawing legal documents—untaught in the use of legal phrases and unlearned as to the application of legal principles. It can well be said that it is an ill-expressed and an inartificial instrument. There is difficulty and doubt in ascertaining its true construction and legal operation. I think I should be violating the principle here laid down, if I compelled the defendant to accept a title under these circumstances.

I dismiss the action with costs.

E. B. B.

[See *In re Schnadhorst*, [1901] 2 Ch. 338.—*Rep.*]

[IN CHAMBERS.]

WILSON v. POSTLE.

Division Courts—R.S.O. 1897 ch. 60 sec. 190—Garnishee Resident out of Ontario—Jurisdiction—Attornment.

1901
June 1.

Only debts by persons residing or carrying on business in Ontario are subject to garnishee proceedings under sec. 190 of the Division Courts Act, R.S.O. 1897 ch. 60, and the acceptance of service of a summons on behalf of a garnishee residing out of the Province by a solicitor in the Province and his appearance at the hearing and raising no objection, does not confer jurisdiction on the division court.

In re McCabe v. Middleton (1895), 27 O.R. 170, distinguished.

THIS was an application for a mandamus to the junior Judge of the county court of the county of Simcoe, requiring him to hear and determine a claim brought in the first division court of that county.

The claim was for an amount within the jurisdiction of the court, and the primary creditor and the debtor resided within its jurisdiction, but the garnishee resided out of the jurisdiction, namely, in British Columbia, and did not carry on business in Ontario.

The learned junior Judge refused to hear and adjudicate upon the claim, holding that the Court had not jurisdiction in the matter.

The application was made before MEREDITH, C.J.C.P., in Chambers, on the 20th day of May, 1901.

A. E. H. *Creswicke*, for the primary creditor.

D. L. *McCarthy*, for the primary debtor.

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June 1. MEREDITH, C.J.:—The garnishee is a resident of British Columbia and does not carry on business in Ontario, and the proceedings in question were taken before judgment by the primary creditor, under sec. 190 of the Division Courts Act, R.S.O. 1897 ch. 60, to attach the debt alleged to be due by the garnishee to the primary debtor.

The summons was issued out of the first division court in the county of Simcoe and was served upon a solicitor who accepted service of it for the garnishee.

The debt claimed to be due by the primary debtor to the primary creditor was disputed. All parties appeared before the junior Judge of the county court of the county of Simcoe, presiding at the sittings of the first division court at which the hearing was to take place, the garnishee appearing by his agent and raising no objection to the jurisdiction of the court to hear and determine the matter of the garnishee proceeding.

The primary debtor, however, objected to the jurisdiction of the court, upon the ground that the garnishee did not reside in Ontario, and that the proceedings were unauthorized by the Division Courts Act, his contention being that only debts due by persons residing in Ontario are the subject of garnishee proceedings under the Act; and to that contention the learned junior Judge gave effect.

The primary creditor now moves for a mandamus to the Judge, commanding him to hear and determine the plaint between the primary creditor, the primary debtor and the garnishee.

On the argument of the motion, Mr. Creswicke for the applicant contended that the garnishee having appeared and attorned, as he contended he had done, to the jurisdiction of the court, it was not open to the primary debtor to raise the question of jurisdiction, and that the learned junior Judge had jurisdiction to try, and ought to have tried, and determined the question of the indebtedness of the garnishee to the primary debtor.

I am unable to agree with this contention. It is quite true that in an action a defendant who is not subject to the jurisdiction of the Court in which the action is brought may give the Court jurisdiction by appearing and attorning to its jurisdiction; but that principle has, in my opinion, no application to such a

proceeding as that in question here. The garnishee proceeding is a species of execution designed to enable a creditor to reach property of his debtor which is not exigible in execution in the ordinary way, and in the nature of the thing one would expect that such a proceeding would be confined to cases where the garnishee is a resident of Ontario, or the debt due by him to the primary debtor is one for which he might be sued in this Province, and the language of the Division Courts Act providing for garnishee proceedings makes it plain, I think, that it was intended to confine the right to take such proceedings to such cases as I have mentioned.

Section 183, which deals with garnishee proceedings after judgment, requires the application to be supported by evidence that the persons, one or more, alleged to be indebted to the primary debtor is or are within the Province; and section 190, subject to the exception contained in its second sub-section, requires that the summons be issued out of the division in which the garnishee, or one or more of several joint garnishees, live or carry on business, clearly pointing to the necessity of the garnishee, or one or more of the joint garnishees, being a resident of, or carrying on business in, Ontario.

If the view which I have expressed be not the correct one, the anomalous result might be that where all three—primary creditor, primary debtor, and garnishee—reside in a foreign country in which garnishee proceedings are not provided for, if the garnishee were willing to aid the primary creditor, as in this case the garnishee is, a plaint might be brought in any division court in this Province, and, if the contention of Mr. Creswicke be correct, that court would be given jurisdiction—the garnishee appearing and attorning to its jurisdiction—not only to require the debt due by the garnishee to be paid to the primary debtor, but also to try and determine the question of the liability of the primary debtor to the primary creditor, a result that can scarcely have been contemplated by the Legislature in enacting the garnishee provisions of the Division Courts Act.

In re McCabe v. Middleton (1895), 27 O.R. 170, is not in conflict with my conclusion, for there some division court had jurisdiction, and all that was decided was that the power to

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transfer to the proper Court, where the proceeding was begun in a wrong Court, was applicable to garnishee proceedings, while in this case, if I am correct in my interpretation of the Act, no division court had jurisdiction to entertain the plaint.

The result is that, in my opinion, the learned junior Judge was right, and that the motion should be dismissed with costs.

G. F. H.

1901

CLARKE V. RUTHERFORD.

May 22.

Trespass—Assault—Conviction for—Criminal Code, secs. 783, sub-sec. (c), sec. 786—Civil Action—Right to Maintain.

A defendant charged with having committed an assault with intent to do bodily harm, on being asked by the justice whether he would be tried before him summarily, or by a jury, elected to be so tried by him, and pleaded guilty to the charge. This was objected to by the prosecutor, when the justice stated that he would first ascertain the extent of the assault. After hearing the evidence, he adjudicated upon the case and drew up a conviction imposing on the defendant a fine, and the costs, which the defendant paid:—*Held*, that the justice in making the conviction was acting under the special statutory authority for the trial of indictable offences conferred by sec. 783, sub-sec. (c) and sec. 786, under which a defendant is not relieved from further civil proceedings; and that the defendant was liable to a civil action for the assault.

THIS was an action tried before STREET, J., without a jury, at the Stratford spring assizes on the 15th March, 1901.

A. M. Panton, for the plaintiff.

Mabee, K.C., for the defendant.

The plaintiff claimed damages for an assault and battery committed by the defendant upon him.

The defendant pleaded that the plaintiff had laid an information before a justice of the peace against him for the assault in question, and that he was brought before the said justice and pleaded guilty of the said offence, and was thereupon adjudged for his said offence to pay a fine of \$20 and the costs of the prosecution: that he thereupon paid the said fine and costs; and was thereby released from all further proceedings, civil or criminal, for the same offence; and that the plaintiff was present when the defendant was brought before the said justice,

and consented to the said charge being heard summarily before him and to the conviction being made.

The plaintiff replied denying that he consented to the charge being disposed of by the justice in a summary manner.

It was agreed by the parties that if the plaintiff should be held entitled to recover, his damages should be assessed at \$300.

The facts, so far as material, were as follows :

The plaintiff, on the 21st September, 1899, laid an information before a justice of the peace against the defendant, charging that he "did assault and beat him the said Richard C. Clarke, with intent to do bodily harm, contrary to the statute in such case made and provided."

Both parties appeared before the justice with their counsel. The defendant was asked by him whether he elected to be tried by him or by a jury. The defendant said he would be tried by him, and, the charge being read over to him, he pleaded guilty. The justice refused to accept the plea as he did not know how seriously the plaintiff had been injured, and proceeded to take the evidence. Counsel for the plaintiff objected to the case being summarily disposed of as a common assault, and asked that the defendant be committed for trial, but called his evidence after the defendant had elected to be tried by the justice.

At the conclusion of the evidence the justice drew up a conviction in the following words:

"Be it remembered that on the 21st day of September in the year 1899, at Milverton, William F. Rutherford, being charged before me the undersigned W. D. Weir, J.P., of Milverton, in the county of Perth, and consenting to my trying the case summarily, for that he the said William F. Rutherford did assault and beat Richard C. Clarke, and pleading guilty to such charge, he the said William F. Rutherford is thereupon convicted before me of the said offence; and I adjudge him the said William F. Rutherford for his said offence to be fined the sum of \$20 and the costs of this action, payable forthwith, or to be committed to the common gaol for 21 days."

The defendant paid the fine and costs.

May 22. STREET, J.:—Under sec. 265 of the Criminal Code a common assault is an indictable offence; and under sec. 864 a

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charge of unlawfully assaulting and beating may be summarily heard and determined by any justice of the peace, if neither the person aggrieved nor the person accused object to his doing so.

If the charge is heard under sec. 864 the justice deals with it under his summary jurisdiction; and under sec. 866 his adjudication puts an end to any further proceedings, either civil or criminal, against the defendant for the same assault. But the justice has no jurisdiction to deal with the charge under his summary jurisdiction without the consent of the prosecutor.

The justice in the present case, however, appears to have treated the case as one under sub-sec. (c) of sec. 783 of the Code, which provides that when any person is charged before him with having committed an aggravated assault upon another, he may, under sec. 786, ask him whether he consents that the charge may be tried before him, or whether he desires that it shall be sent for trial by a jury; and if the person charged elects to be tried before him, he may proceed to try him; and, if he pleads guilty or is convicted, he may proceed to sentence him to fine or imprisonment.

This course was followed; the defendant elected to be tried before the justice, and, having pleaded guilty, was sentenced to a fine of \$20 and costs in the form RR. to the Code, which is the form applicable to proceedings under the last mentioned sections. The justice, when acting under these sections, does not exercise his summary jurisdiction but his special statutory authority for the summary trial of indictable offences. The consent of the person charged is necessary in most cases to the exercise of this authority, but that of the prosecutor is not. The result is different, for a conviction only relieves the person charged from any further criminal proceedings: see sec. 799; it does not relieve him from a civil action for damages.

I am of opinion, after hearing the evidence, that the plaintiff objected to the exercise by the justice of his summary jurisdiction, and that the case was dealt with under secs. 783 and 786 as an aggravated assault, and that the justice tried it under secs. 786 and 788.

The defendant is, therefore, not relieved by the conviction from the present action; and there must be judgment against him for the \$300, with the costs of the action.

The defendant has counterclaimed for a debt due him by the plaintiff, and it was ordered at the former trial that this debt should be set off. Nothing was said upon the trial before me as to this, and I will make no endorsement upon the record until I am informed as to the disposition intended to be made of the counterclaim, if an agreement exists, or until I have heard evidence as to it.

G. F. H.

Street, J.

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ABELL V. MIDDLETON.

1901

Equitable Lien—Charge on Land—Beneficial Ownership—Parol Trust—Prior Lien—Voluntary Conveyances.

May 23.

The defendant who had been for some years in possession of a farm purchased by his father with the intention of giving it to him, and who had in fact devised it to him, purchased a machine from the manufacturers giving his notes therefor, and at the same time executed a document which was duly registered, and in which it was stated that the land had been so "willed" to him that he had a good title thereto, and would not further incumber it, and he thereby charged it with the payment of the notes. The father subsequently conveyed the land to the defendant, but upon the condition of his executing a mortgage, which he did to certain persons who had advanced moneys to him. The defendant, on the ground that the land had been conveyed to him on an alleged trust for his family, conveyed it to his wife, the consideration being \$1.00 and love and affection, and the wife, for the like consideration, conveyed it to an infant son :—

Held, that the charge in favour of the manufacturers was enforceable against the defendant and those claiming under him, by the plaintiff, the assignee of the manufacturers, but was subject to the mortgage; and the evidence displacing any trust in favour of the defendant's family, the conveyances by the defendant and his wife must be treated as merely voluntary and subject to the plaintiff's charge.

THIS was an action tried before STREET, J., at Barrie, without a jury, on the 6th and 7th of May, 1901.

W. A. Boys, for the plaintiffs.

D. Ross, for the defendants James and Annie Middleton.

Strathy, K.C., for the official guardian.

Denton, K.C., and H. L. Dunn, for the defendant McNab.

The facts were as follows:

On 19th July, 1893, the defendant James Middleton was in occupation of a farm owned by his father, George Middleton, being the south-west quarter of lot 19, in the 5th concession of

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Flos. On that day he purchased from one Abell, who was an implement maker, through his agent one Purvis, a machine, called a separator, for \$1,000, payable in three equal annual instalments on the 1st March, 1894, 1895, and 1896, with interest at 7 per cent., for which he gave his notes to Abell.

In order to procure this credit James Middleton at the time of the purchase signed a document the material parts of which were as follows:

"I am willed by my father the following land and have a good title thereto in my own name, being south-west quarter (50 acres) lot No. 19, concession 5, township of Flos, the current cash value of which is not less than \$1,500, and the same is free and clear of all encumbrances. . . . And I agree not to sell or further encumber the said lands until all my notes and other indebtedness to John Abell are paid. And I hereby charge the said lands with the payment of the said notes and all renewals thereof and all my indebtedness to John Abell. This statement is made to John Abell to procure credit of him in purchase of the goods mentioned in the within agreement, and the same are sold by him on the faith thereof.

"Dated at Flos the 19th day of July, 1893.

"Witness (sgd.) T. R. Purvis.

"(Sgd.) James Middleton."

The "within agreement" referred to was the contract of James Middleton with Abell for the purchase of the separator.

These documents were duly registered together in the proper registry office of the county of Simcoe, on the 11th September, 1893.

On the 5th August, 1894, James Middleton purchased other machinery from the defendants Woon & Co., and gave them a similar instrument, purporting to charge the same land with the purchase money, and this instrument was registered on the 26th November, 1895.

In the year 1894, John Abell transferred to the plaintiffs all his rights under the contract with James Middleton, and endorsed over the notes to them.

On the 11th June, 1897, George Middleton, the owner in fee of the land in question, conveyed it to James Middleton, the expressed consideration in the conveyance being his natural love and affection and \$1.

On the 14th June, 1897, James Middleton, his wife joining to bar her dower, made a mortgage to the defendants, J. & D. McNab for \$250 upon the land in question.

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The conveyance from George Middleton to James Middleton and the mortgage from James Middleton to the McNabs, although bearing date on different days, were drawn up in the same handwriting and registered at the same minute, that is to say, at 1.30 p.m. on the 15th June, 1897.

On the 23rd June, 1897, James Middleton conveyed the same land to his wife, the defendant Annie Middleton, the stated consideration being his natural love and affection and \$1.

On the 18th July, 1898, the notes given to John Abell by James Middleton for the price of the separator, being still unpaid, were renewed by new notes made by him and his wife Annie Middleton to the plaintiffs, the last of which became due on the 1st January, 1900.

On the 26th July, 1900, Annie Middleton conveyed the lands in question to her son, the defendant Frank Middleton, an infant under the age of 21 years, the consideration alleged being her natural love and affection and \$1.

On the 6th October, the plaintiffs began this action, asking for judgment upon their notes against James and Annie Middleton, and to have their charge upon the land in question declared and enforced.

Judgment was given to them by order on the 5th November, 1900, against the defendants James and Annie Middleton upon the notes for \$1,947.09 and costs, and the action proceeded against the defendants for the declaration and enforcement of the charge upon the lands.

James Middleton defended upon the ground that George Middleton had conveyed the land to him only as a trustee for his family, and that he never became the beneficial owner of it; the defence of the infant defendant was to the same effect. The defendants the McNabs set up that the conveyance to James Middleton by his father, George Middleton, was made upon a trust to make the mortgage to them; and that the conveyance and mortgage were made simultaneously to carry out the trust; and they denied that the plaintiffs had any right to the land as against or in priority to their mortgage.

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May 23. STREET, J.:—I must hold upon the evidence that the written agreement between John Abell and James Middleton, which is the foundation of the present action, properly sets forth the whole terms of the bargain between them, and must be enforced.

At the time it was executed James Middleton had been for some years in the possession of the property; it seems to have been bought by his father, George Middleton, with the intention of giving it to James; he had, in fact, made a will giving it to him, and James had come to regard it as his own, although his father had not, in fact, transferred it to him.

Under these circumstances the agreement between him and Abell operated as a contract to charge this specific parcel of land with the purchase money of the separator, and being for a valuable consideration which passed to James Middleton, was enforceable in equity against him, and those claiming under him, upon his afterwards acquiring the title to the land: *Holroyd v. Marshall* (1861), 10 H.L.C. 191.

The charge, therefore, attached upon the full beneficial ownership which he derived under the conveyance from George Middleton; and the remaining question is as to the extent of that beneficial ownership.

The evidence satisfies me that it was a condition, and the only condition, upon which the conveyance was made to him by George Middleton, that he should secure the debt due to the defendants the McNabs by a mortgage of the property. If he had not agreed to do this he would not have got the conveyance, and in order to carry it out, the delivery of the deed and the mortgage were simultaneous. The conveyancer was not a lawyer but was a brother of James Middleton, and being in the habit of occasionally drawing conveyances, advised this method of carrying out the object which his father had in view. James accepted the conveyance subject to the condition that he should make the mortgage and immediately performed it. The trust thus imposed upon James' title being satisfactorily proved, and having been performed by him, is not one which can be disregarded; nor is it an objection that it was created by parol, and not by writing. In fact James never took a beneficial interest excepting subject to this mortgage. The mortgage is, therefore,

paramount to the plaintiff's charge, although subsequent to it in time, just as if the mortgage had been made by George Middleton before the conveyance to James.

It was alleged that the conveyance to James was also subject to a further trust in favour of his wife and children; but the evidence does not, in my opinion, support any such trust. The conveyance from James to his wife in June, 1897, and from her to her infant son Frank, must, therefore, be treated as mere voluntary conveyances which are subject to the plaintiff's charge.

There will, therefore, be a declaration that the plaintiffs are entitled to a charge against the lands in question as against the defendants, other than the defendants the McNabs; that the mortgage of the defendants the McNabs is paramount to the charge of the plaintiffs. The plaintiffs are to pay the costs of the McNabs; they are also to pay the infant's costs and add them to their own, and they are entitled to the usual mortgage judgment for sale with costs.

G. F. H.

BARBER V. CLEAVE.

Line Fences—Agreement to Keep in Repair—Damages—By-law—Liability.

1901
May 27.

The plaintiff and defendant, adjoining land owners, made an arbitrary division of the line fence between their lots, which was less than five feet in height, which they were to build and keep in repair. By reason of the defendant allowing his portion to get into disrepair, his cattle and sheep got on to the plaintiff's land, and damaged it. The defendant also allowed his cattle to escape and run at large on the highway, from whence, by breaking down the plaintiff's fences, they got on to the plaintiff's land, and further damaged it. A township by-law provided that no fence should be less than five feet high, etc., and prohibited the running at large of all breachy cattle, *i.e.*, cattle known to throw down or leap over any fence four feet high, and provided for impounding them, etc. :—

Held, that the defendant was liable for the damages sustained by the plaintiff; and that such liability was not displaced by the by-law.

THIS was an action tried before MACMAHON, J., without a jury, at Milton, on March 4, 1901.

Shepley, K.C., and *J. B. McLeod*, for the plaintiff.

James Bicknell, for the defendant.

The facts are stated in the judgment.

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May 27. MACMAHON, J.:—The plaintiff was since January, 1896, and still is, the owner of the east half of lot 16 in the 10th concession of the township of Esquesing, and the defendant the owner of the west half of the same lot. And the plaintiff in his statement of claim alleges that the defendant's cattle and sheep have since the 1st day of January, 1896, on divers times and occasions, broken and entered the lands owned by the plaintiff and damaged the fruit trees in the plaintiff's orchard.

It is also alleged that since the said date the defendant's cattle and sheep have, on divers times and occasions, been running at large on the allowance for road between lots 15 and 16 in the 10th concession of the said township, contrary to the statute, "The Line Fences Act," R.S.O. 1897, ch. 284,* and, while so running at large, have wrongfully broken down the plaintiff's fences on the southerly limit of the east half of said lot, and have entered the plaintiff's lands, causing damage to the said lands and the fruit trees thereon.

The township of Esquesing on the 4th day of April, 1857, passed by-law number 77, enacting that any fence of rails or poles should not be less than five feet in height, and should have no open space under the bottom rail or between the first four rails more than four inches.

And by said by-law the following animals are (amongst others) prohibited from running at large, viz.: "All neat and black cattle of every description known to be breachy, that is to say, to be known to throw down or leap over any fence of four feet in height. And where animals are impounded, the pound keeper is to notify three freeholders to judge the fence and appraise the damage, and if they find the fence lawful but for animals running at large contrary to law or animals proved to be breachy, the fence shall not be called in question."

It was not denied that the defendant's cattle and sheep had entered on the plaintiff's land; but it was denied that they entered through any fence belonging to the defendant which was defective.

* Sec. 3: "Owners of occupied adjoining lands shall make, keep up and repair a just proportion of the fence which marks the boundary between them, or, if there be no fence, they shall so make, keep up and repair the same proportion which is to mark such boundary," etc.

The line fence between the east and west half of the lot is made of barbed wire (the plaintiff and defendant waiving the statutory requirements and agreeing on something different), and there was an arbitrary division made between the plaintiff and the defendant as to the portion of the line fence which each was to build and keep in repair.

I find that the plaintiff kept in proper repair the part which it was understood and agreed he should maintain; but the portion which the defendant said formed his half of the line fence was allowed to remain in such disrepair that it was open in many places; and there was evidence of what is called a "cattle runway" through a portion of the defendant's fence, by which the defendant's cattle came upon the plaintiff's land, indicating that they had frequently traversed through the same way. And those who saw the sheep belonging to the defendant on the plaintiff's land noticed that the defendant's fence where it was broken gave evidence of the sheep having passed through it by the wool left on the barbed wire.

In *Buist v. McCombe* (1882), 8 A.R. 598, at p. 600, the Court confirmed the opinion expressed by the junior Judge of the county court of the county of Simcoe, who tried the case: "that when it is not the duty of either party to keep up any particular and defined portion of the division fence, the one whose cattle trespasses on his neighbour's land is answerable for the trespass, that is, he must keep his cattle from his neighbour's land at his own risk."

Where the line fence between adjoining owners has been divided between them for repairs, the law as to damages resulting from trespass by the cattle of one owner on the land of the other is stated in the American Courts in almost the same terms as in the excerpt from the judgment in *Buist v. McCombe*. Thus, in *Polk v. Lane* (1833), 12 Tenn. (4 Yerg.) 36, which was an action in trespass to recover for injuries done by cattle, it was held by the Court that the land owner must shew if they entered through his part of the division fence, that it was such as the statute required. And in *D'Arcy v. Miller* (1877), 86 Ill. 102, it was held that if cattle entered the plaintiff's land through the part of the fence which the other proprietor was bound to repair, the plaintiff must shew that the fence was not a lawful fence. See also

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MacMahon, J. an interesting article on "Fence Law" in 22 Central Law
1901 Journal (1886), p. 196.

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CLEAVE.

As to that part of the plaintiff's claim for damages arising out of the trespasses alleged, and, as I have found, proved to have been committed by the escape of the defendant's cattle and sheep on to the plaintiff's land through a portion of the fence defined by the defendant himself as his portion of the division fence which it was his duty to keep up, but which duty he neglected to perform, he is I think clearly liable in trespass.

Then as to the damages caused by the cattle and sheep which had entered the plaintiff's lands from the highway. The by-law does not in my opinion displace the statute. The by-law provides that certain animals therein defined are prohibited from running at large; while the second section of R.S.O. 1897 ch. 272, "An Act Respecting Pounds," provides that "the owner of any animal not permitted to run at large by the by-laws of the municipality, shall be liable for any damage done by such animal, although the fence enclosing the premises was not of the height required by such by-laws." That is, the owner of the cattle will be liable as at common law.

There is not anything in the by-law which could be construed as permitting these cattle and sheep to run at large, and they, as I find, having strayed from the highway upon the plaintiff's land the defendant must answer for any damage done by them irrespective of any question of fencing: *Crowe v. Steeper* (1881), 46 U.C.R. 87, at pp. 91-2; *McSloy v. Smith* (1895), 26 O.R. 508.

The evidence as to the damages caused to the plaintiff's orchard was very conflicting, some of the plaintiff's witnesses estimating them at a considerable sum, while the defendant's witnesses placed the amount of the damages at a low figure. The question of damages is somewhat complicated by reason of the fact that other cattle besides those owned by the defendant trespassed on the plaintiff's lands. No complaint was made against the owners of the other cattle; and I find that the greater portion of the damage done to the orchard was caused by the defendant's cattle and sheep as they were frequently trespassing in the orchard.

I think a fair estimate of the damage caused to the orchard when the cattle and sheep were not running at large but escaped from the defendant's land through his fence into the plaintiff's orchard, is \$100. And I assess the damage caused to the orchard when the defendant's cattle and sheep were running at large on the highway and strayed upon the plaintiff's land at the sum of \$10.

There will be judgment for the plaintiff for the sum of \$110 with full costs.

G. F. H.

MacMahon, J.

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IN RE HARRISON.

1901

July 4.

Devolution of Estates Act—Partial Intestacy—Non-disposition of Residuary Estate—Inapplicability of Act—R.S.O. 1897 ch. 127.

The Devolution of Estates Act, R.S.O. 1897 ch. 127, does not apply where there is partial intestacy, as in this case, where a testator failed to dispose of his residuary estate.

Re Twigg's Estate, [1892] 1 Ch. 579, followed.

THIS was an application by the executors under the will of Mary Ann Harrison, who was executrix under the will of her deceased husband, Adam Harrison, under Rule 938, for construction of the will of Adam Harrison, which was dated June 9th, 1900.

The circumstances of the case appear from the judgment.

The matter was argued before STREET, J., on June 14th, 1901.

J. J. Maclellan, for the executors.

J. D. Montgomery, for James Harrison, representing the next of kin.

No cases were cited on the argument.

July 4. STREET, J.—The testator, after making certain provisions for his widow and his sister, gave \$500 to one A. H. Gilmour, and directed that the balance of his estate should be paid to or handed over to ——. The blank left was not filled up, and the result is an intestacy as to the residuary estate. The question raised before me is whether under sec. 12 of the

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Devolution of Estates Act, R.S.O. 1897, c. 127, the widow, who survived the testator, was entitled first to \$1000 before distribution between herself and the next of kin.

This point under a similar English statute has been raised and determined adversely to the widow's right in *Re Twigg's Estate*, [1892] 1 Ch. 579, where it is held that the statute is not intended to apply to a case of partial intestacy. I follow that case, and hold that the residuary estate in the present case is to be distributed as if sec. 12 of the Devolution of Estates Act had not been passed.

The case in question, although clearly in point and quoted in the late edition of Williams on Executors, was not referred to by the solicitor for the applicant.

There will be no costs of the application.

A. H. F. L.

[DIVISIONAL COURT.]

ARMSTRONG ET AL. V. CANADA ATLANTIC R.W. CO.

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Master and Servant—Workmen's Compensation Act—Notice of Injury—Excuse for Want of—Evidence—Statement of Deceased—Negligence—Cause of Injury—Jury.

August 27.

The knowledge of the defendants of the injury and the cause of it, at the time it occurs, is (in case of death) a reasonable excuse for the want of the notice of injury required by sec. 9 of the Workmen's Compensation for Injuries Act, R.S.O. 1897 ch. 160, where there is no evidence that they were in any way prejudiced in their defence by the want of it.

Where the deceased received the injuries from which he died by being run over by a train of cars, a statement made by him immediately after he was run over, in answer to a question as to how it happened, "I slipped and it hit me," was held admissible in evidence.

Thompson v. Trevanion (1693), Skin. 402, *Aveson v. Kinnaird* (1805), 6 East 188, 193, and *Rex v. Foster* (1834), 6 C. & P. 325, followed.

Upon that evidence and evidence of the slippery condition, by reason of snow and ice, of the place where the deceased slipped, a question should have been submitted to the jury whether he slipped by reason of such condition and whether such condition was due to the negligence of the defendants.

THIS action was brought by Nora Armstrong, the widow of Charles Armstrong, and Eunice Armstrong, his infant daughter (by Nora Armstrong, her next friend), to recover damages for the death of the husband and father owing to the alleged negligence of the defendants.

The statement of claim alleged that the deceased was the yard foreman of the night shunting crew in the defendants' station grounds at Ottawa, and that on the 8th February, 1899, while engaged in shunting he was run over by a train of cars and so severely injured that he died a few hours afterwards; that the deceased lost his life by reason of the negligence of the defendants in allowing snow to accumulate and remain upon their premises for an unreasonable length of time between the tracks, where, by reason of changes in the weather, it became slippery and dangerous, and the deceased slipped, and, falling under the cars, was run over, and such negligence constituted a defect within sec. 3, sub-sec. 1, of the Workmen's Compensation for Injuries Act, R.S.O. 1897 ch. 160; that the injuries were caused by the negligence of the servants of the defendants in charge and control of the engine, by "kicking" the cars on to the siding after they were detached from the engine in a

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negligent and improper manner and at an unusual and excessive rate of speed, and without warning to the deceased.

The trial took place before MacMahon, J., and a jury at Ottawa.

The trial Judge withdrew the case from the jury and dismissed the action, because the notice of the injury required by sec. 9 of the Workmen's Compensation for Injuries Act was not given to the defendants. The dismissal was without costs.

The plaintiffs moved to set aside the nonsuit and for a new trial, upon the grounds that the trial Judge should have dispensed with the notice of injury because it was shewn by the evidence that the defendants paid the plaintiff Nora Armstrong a small sum of money and made promises and representations that her application for damages for her husband's death would be considered, and she would be notified of their decision, and thereby induced the plaintiffs to refrain from taking legal proceedings to recover damages under the Act; that the defendants had, in fact, ample notice of the circumstances surrounding the death, and they were not shewn to have been prejudiced in their defence, and the provisions of sub-sec. 5 of sec. 13 should have been applied; that the trial Judge erred in finding that there was no evidence adduced upon which an action could be sustained at common law.

The defendants made a cross-motion to dismiss the action upon the grounds that the trial Judge erred in admitting evidence of statements made by the deceased, and that no evidence of negligence on the part of the defendants was adduced upon which a jury could properly find a verdict.

The motions were heard by a Divisional Court composed of ARMOUR, C.J.O., and FALCONBRIDGE, C.J., on the 22nd January, 1901.

A. E. Fripp, for the plaintiffs. In case of death the notice is not absolutely required if the Judge is of opinion that there was a reasonable excuse for not giving it: R.S.O. 1897 ch. 160, secs. 19, 13, (sub-sec. 5), 14: and here it was quite unnecessary.

C. J. R. Bethune, for the defendants. The excuse is insufficient on the evidence and the authorities: *Keen v. Millwall Dock Co.* (1882), 8 Q.B.D. 482; *Clarkson v. Musgrave* (1882),

9 Q.B.D. 386; *Macey v. Hodson* (1881), 72 L.T.J. 140; *Trail v. Kelman* (1887), 15 Rettie 4; *Connolly v. Young's Paraffin Light and Mineral Oil Co.* (1894), 22 Rettie 81; *McFadyen v. Dalmellington Iron Co.* (1897), 24 Rettie 327; Ruegg on the Employers' Liability Act, 3rd ed., p. 60. Physical possibility is the test. The onus is on the plaintiffs to satisfy the Court that the defendants are not prejudiced. The appellate court has not the same discretion as the trial Judge, notwithstanding the words of sub-sec. 5. The nonsuit is right on the merits. There is no evidence of negligence, even if the statements of the deceased are admissible; no one saw the accident, and there is nothing to shew how it occurred: *Kervin v. Canadian Coloured Cotton Mills Co.* (1899), 29 S.C.R. 478; *Farmer v. Grand Trunk R.W. Co.* (1891), 21 O.R. 299.

[ARMOUR, C.J.O.—But there is a later case, *Asbestos and Asbestic Co. v. Durand* (1900), 30 S.C.R. 285.]

Fripp, in reply. The notice may be waived by conduct: *Wright v. Bagnall* (1900), 69 L.J.Q.B. 551. On the question of negligence causing the accident, see *Bromley v. Cavendish Spinning Co.* (1886), 2 Times L.R. 881; *Fenna v. Clare*, [1895] 1 Q.B. 199; *Smith v. South Eastern R.W. Co.* (1895), 12 Times L.R. 67; *McGiffin v. Palmer's Shipbuilding and Iron Co.* (1882), 10 Q.B.D. 5.

August 27. The judgment of the Court was delivered by ARMOUR, C.J.O.:—I do not think that the learned trial Judge should have dismissed this action for the want of the notice required by sec. 9 of the Workmen's Compensation for Injuries Act, for that section provides that in case of death the want of such notice shall be no bar to the maintenance of the action, if the Judge shall be of opinion that there was reasonable excuse for such want of notice.

The notice required by this section is, by sec. 13, to give the name and address of the person injured, and to state in ordinary language the cause of the injury and the date at which it was sustained; and sub-sec. (5) of sec. 13 provides that the want or insufficiency of the notice required by this section, or by sec. 9 shall not be a bar to the maintenance of an action for the recovery of compensation for the injury if the Court or Judge

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before whom such action is tried, or, in case of appeal, if the Court hearing the appeal is of opinion that there was reasonable excuse for such want or insufficiency, and that the defendant has not been thereby prejudiced in his defence.

The deceased was killed on the 8th February, 1899, by being run over by a car in the yard of the defendants while in the employment of the defendants and while performing his duties as their servant.

These facts were well known to the defendants at the time, and the notice required by the Act, if given, would have given them no information that they did not already possess, and this, in my opinion, afforded a reasonable excuse for the want of such notice.

The whole object of the Act in requiring notice to be given was attained by the knowledge of the defendants, at the time, of the injury and of the cause of it, and there was no evidence that they were in any way prejudiced in their defence by the want of it.

My opinion that the knowledge of the defendants of the injury and of the cause of it was a reasonable excuse for the want of it, is confirmed by the provisions of sec. 14 of the Act, permitting the Judge to adjourn the hearing of the case for the purpose of enabling such notice to be given—a proceeding wholly superfluous where, as in this case, the defendants were always well aware of everything that the notice would tell them.

The learned trial Judge admitted in evidence the statement of the deceased, made immediately after he was run over, in answer to a question as to how it happened, "I slipped and it hit me," or "they hit me," and according to another witness, "I slipped and it hit me," or, "I slipped and fell."

That this statement was admissible is shewn by the cases of *Thompson v. Trevanion* (1693), Skin. 402; *Aveson v. Kinnaird* (1805), 6 East 188, at p. 193; *Rex v. Foster* (1834), 6 C. & P. 325.

Taking this statement with the evidence of the condition as to snow and ice of the place where he slipped, the question must, in my opinion, have been submitted to the jury whether

he slipped by reason of such condition, and whether such condition was due to the negligence of the defendants.

The appeal of the plaintiffs must, therefore, be allowed with costs, and the appeal of the defendants dismissed with costs, and the costs of the last trial will be costs in the cause to the plaintiffs in any event of the suit.

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[DIVISIONAL COURT.]

REX V. DUNGEY.

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July 19.

Conviction—Certiorari—Selling Meat Unfit for Food—First Proceeding under Criminal Code and then under Public Health Act—Excess of Jurisdiction—Evidence.

A defendant being charged with offering for sale, publicly, meat unfit for food, the magistrates treated the charge, though ambiguously worded, as one for an offence under the Criminal Code, sec. 194, and took evidence in support. They then concluded that an offence had been made out under a municipal by-law based on the Public Health Act, R.S.O. 1897 ch. 248, but not under the Criminal Code, and adjourned for a week "to enable the accused to put in a defence under the new conditions if he so decided." The defendant protested, and offered no defence, and was convicted under the by-law :—

Held, on certiorari, that the conviction must be quashed on the ground of want of jurisdiction; and also because, even if there was power to change the charge to one under the Public Health Act, no evidence was given of the offence so charged after that charge was made.

It is not competent for magistrates where an information charges an offence which they have no jurisdiction to try summarily, to convert the charge into one which they have jurisdiction to try summarily, and to so try it on the original information.

THIS was an appeal from an order of Robertson, J., refusing a writ of certiorari under the circumstances stated in the judgment of MEREDITH, C.J.C.P

The appeal was argued on May 8th, 1901, before MEREDITH, C.J., MACMAHON and LOUNT, JJ.

W. M. Douglas, K.C., for the defendant, contended that there had been excess of jurisdiction, and therefore certiorari was not taken away, whatever the proper construction of sec. 121 of the Public Health Act, R.S.O. 1897 ch. 248; that the magistrates had proceeded as though on an offence under the Criminal Code, but a defendant would manage his case differ-

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ently if undergoing only a preliminary hearing, to what he would do if being summarily tried; that they took the evidence under the Code and then convicted under another jurisdiction, which is not permissible: *Miller v. Lea* (1898), 25 A.R. 428.

J. H. Moss, for the magistrates, contended that as they regarded the information as one which could be rested either on the Criminal Code or on the Public Health Act, they were justified in holding the matter, as it were, in suspense, and proceeding concurrently under the two statutes; and that as the defendant had cross-examined all the witnesses he was not injured, and cited sec. 121 of the Public Health Act.

Douglas, in reply, referred to *Regina v. Walsh* (1883), 2 O.R. 206; *Regina v. Rowlin* (1890), 19 O.R. 199; *Regina v. Dowling* (1889), 17 O.R. 698; *Regina v. Elliott* (1886), 12 O.R. 524; *Regina v. Brady* (1886), 12 O.R. 358; *Hespeler v. Shaw* (1858), 16 U.C.R. 104; *Regina v. Mines* (1894), 25 O.R. at pp. 577-8.

July 19. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an appeal by the defendant from an order of Robertson, J., dated May 6th, 1901, dismissing his motion for an order for a writ of certiorari for the removal into the High Court of the conviction of the defendant on a charge of exposing and offering for sale on the public market in the town of Mitchell a quantity of meat, being dressed beef, unfit for food for man, the same so appearing to the complainant William Brown, sanitary inspector for the town of Mitchell, and the same being then found in the possession of the defendant.

My learned brother Robertson treated the conviction as one for an offence under sec. 122 (sec. 11 of the by-law) of the Public Health Act, R.S.O. 1897 ch. 248, and being of opinion that the right of certiorari to remove a conviction for such an offence was taken away by sec. 122, dismissed the appellant's motion.

By sec. 194 of the Criminal Code, 1892, 55-56 Vict. ch. 29 (D.), every one is guilty of an indictable offence and liable to one year's imprisonment who knowingly and wilfully exposes for

sale or has in his possession, with intent to sell for human food, articles that he knows to be unfit for human food.

By sec. 11 of the by-law in force in the municipality under sec. 122 of the Public Health Act, it is provided "that no person shall offer for sale as food within this municipality any diseased animal or any meat, fish, fruit, vegetables, milk, or other article of food which by reason of disease, adulteration, impurity or any other cause, is unfit for use." The penalty for an offence against this section is a fine of not less than \$5 nor more than \$50, to be recoverable by summary proceedings before any two justices or a police magistrate.

There is no summary jurisdiction to try for an offence against sec. 194 of the Criminal Code, unless with the consent of the accused.

The offences created by the two Acts differ essentially from one another. To constitute the offence created by the Code, the prohibited act must be done knowingly and wilfully, the article must be unfit for human food, it must be exposed for sale or had in possession with intent to sell for human food, and the person must know it to be unfit for human food; while the offence under the by-law is complete where the article is offered for sale as food, not saying human food, and it is a diseased animal or one of the enumerated articles which by reason of disease, adulteration, impurity or any cause is unfit for use, again not saying as human food.

The information which was laid against the appellant charged the offence in substantially the same language by which it is described in the conviction.

It will be observed that it does not accurately describe an offence either under the Code or under the by-law, but the description of the offence more nearly corresponds to the definition of the offence created by the Code, for it alleges that the beef which was exposed and offered for sale was unfit for human food, though, as pointed out by my learned brother, it omits the allegation that the act was done wilfully and knowingly, and with the knowledge that the meat was unfit for human food, which are essential ingredients of the offence created by the Code.

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Looking, then, at the information, seeing that it is headed information and complaint for an indictable offence, and having regard to the proceedings before the magistrates, it is manifest, I think, that they treated the charge as one for an offence against the Code. They appear to have begun by calling upon the accused to elect whether he would be tried summarily, and after he had elected against a summary trial they proceeded with the inquiry and took evidence in support of the charge. That occurred on March 7th, and the inquiry was then adjourned for a week.

On March 14th, the appellant being present, the magistrates announced that they concurred in the opinion that a case had been made out under the provisions of the Public Health Act, though not sufficiently serious to warrant them sending the accused for trial under the Criminal Code.

The case was then adjourned until March 19th, as the notes of the evidence shew, "to enable the accused to put in a defence under the new conditions if he so decided."

On March 19th the appellant again appeared, and objected to proceed under the Public Health Act, and asked for a dismissal of the charge against him.

An adjournment was then made until March 26th to proceed with the case under the Public Health Act. This was done against the protest of the appellant.

On March 26th the appellant again appeared and again objected to the case being gone on with under the Public Health Act, and refused to proceed and offered no defence, contending that the proceedings were beyond the jurisdiction of the magistrates. They, however, went on, and one witness was called—William Brown—who gave evidence that he was the complainant and the sanitary inspector for the town of Mitchell, whereupon the magistrates made the conviction which the appellant is seeking to remove into the High Court by certiorari.

I am of opinion upon this state of facts that in assuming to deal with the charge against the appellant as one for an offence against the by-law, and making the conviction for that charge, the magistrates acted without jurisdiction. Though different considerations apply to such a charge as that which was under

consideration in *Miller v. Lea*, 25 A.R. 428, the principle of the decision is applicable to this case. That principle I understand to be that it is not competent for magistrates, where the information charges an offence which they have no jurisdiction to try summarily, to convert the charge into one which they have jurisdiction to try summarily, and to so try it on the original information.

The proceedings in question are open to the further serious objection that, even if there was power to change the charge to one under the Public Health Act, no evidence was given of the offence so charged after that change was made. This objection may at first sight appear technical, but it is really not so, for a defendant may, and often does, take a very different course in cross-examining the witnesses in support of the charge made against him where the investigation is only a preliminary one for the purpose of deciding whether he is to be committed for trial, from that which he takes when the magistrate is trying the case summarily and the proceedings may therefore result in a conviction.

There not being, as I think there was not, jurisdiction in the magistrates to try and convict for an offence against the Public Health Act, it is unnecessary to consider the effect of sec. 121 on the right to certiorari, for where there is no jurisdiction, the right to certiorari is not taken away, even if sec. 121 has the effect which my brother Robertson thought should be given to it.

The appeal will therefore be allowed and the order appealed from be discharged, and an order for the certiorari must go with costs of the appeal to be paid by the respondent to the appellant.

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July 7.

REX v. YOUNG.

Criminal Law—Procedure—Suspended Sentence—Estreating Recognizance—Good Behaviour—Crown Motion—Indictment for Libel—Fresh Libels—Private Prosecutor.

Where a person has been released from custody on a criminal charge upon entering into a recognizance with sureties to appear and receive judgment when called on, it is only on motion of the Crown that the recognizance can be estreated, and judgment moved against the offender.

Where such a recognizance has been given in proceedings for libel, the publication of fresh libels against the prosecutor is no breach of good behaviour under such recognizance, for the defendant may have complete defences against such charges of libel, and the prosecutor must be left to his remedy by action or indictment.

THIS was a motion to make absolute an order *nisi* obtained by Roderick R. McLennan, the private prosecutor herein, calling upon the defendant, Charles W. Young, to shew cause why he should not be ordered to appear at the next sittings of the court of assize, oyer and terminer and general gaol delivery to be holden in and for the united counties of Stormont, Dundas and Glengarry, to receive judgment upon a certain conviction for libel for which he was indicted and tried at the sittings of assizes in and for the said united counties on the 28th day of April, 1887, and thereupon released from custody upon entering into a recognizance with sureties to appear and receive judgment when called upon.

The order *nisi* was obtained upon the affidavits of the private prosecutor, Roderick R. McLennan and others, charging the defendant with having failed to be of good behaviour since entering into the said recognizance, by reason of his having in a newspaper, of which he was the proprietor and publisher, called "The Cornwall Freeholder," in the years 1891, 1895, 1899 and 1900, published articles alleged to be of a defamatory character of and concerning the said Roderick R. McLennan.

The order made by the late Mr. Justice Rose before whom the defendant was tried and convicted, was that the defendant be released upon entering into his own recognizance and with sureties conditional that he would appear when called upon for sentence.

The motion was argued on May 9th, 1901, before MEREDITH, C.J.C.P., MACMAHON and LOUNT, JJ.

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A. B. Aylesworth, K.C., for the motion, cited *Queen v. Beemer* (1888), 15 O.R. 266, on the question of the jurisdiction of the Court, and contended that breach of good behaviour would cover any behaviour analogous to the original offence, such as continuing to libel the prosecutor in the present case.

E. F. B. Johnston, K.C., for the defendant, contended that the private prosecutor had no *locus standi* to make this motion, which should be by the Crown.

July 7th. The judgment of the Court was delivered by MACMAHON, J. [after stating the nature of the motion as above].—The English authorities as to the practice on the matter raised by the present motion are very meagre. Before the passing of any rule in England authorizing the Court to release persons convicted on suspended sentence, it was, where the offence was a slight one, in the discretion of the presiding judge to release the defendant on his own recognizance to appear at any future period when called upon to receive judgment: Archbold's Crown Practice (ed. of 1844), 102.

Where a convicted person was released on bail to appear for sentence when called upon, and it was intended to move for sentence, the recognized practice in England prior to the year 1886 was to serve on the defendant and his bail a notice four days before the motion, and if the defendant did not answer on being called in court, the recognizance might be estreated, and, upon the estreat of the recognizance a warrant might be obtained for the defendant's apprehension: See *Regina v. Chichester* (1857), 17 Q.B. 504 (note); *R. v. Williams* (1870), 18 W.R. 806; Short & Mellor's Crown Office Practice, p. 231.

The former practice in England is now embodied in Rule 177 of the Crown Office Rules, passed in 1886, and is as follows: "If the defendant be not in custody and be under recognizance to appear to receive sentence, the defendant and his bail may be served with a four days' notice that on a day named therein the Court may be moved for judgment, but

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service need not be personal": Short & Mellor's Crown Office Practice, p. 538.

The recognizance entered into by the defendant and his sureties is not before us, but the Criminal Code, sec. 971, 55-56 Vict. ch. 29 (D.), provides that having regard to the trivial nature of the offence and any extenuating circumstances, the Court may, instead of sentencing the offender at once to any punishment, "direct that he be released on his entering into a recognizance with or without sureties, and during such period as the Court directs, to appear and receive judgment when called upon, and in the meantime to keep the peace and to be of good behaviour."

Although the usual practice prescribes the service of a notice on the defendant of the intention to move for judgment, that has been sufficiently complied with by the notice of motion served upon the defendant, to shew cause why he should not appear to receive judgment.

When the jury convicted the defendant and the verdict was recorded and the offender was, by order of the Court, released on bail to appear for judgment, it is only upon the motion by Crown in this Province that the recognizance of the defendant and his bail is estreated or that judgment is moved against the offender.

But even had the applicant, Roderick R. McLennan, a *locus standi* to make the motion, fourteen years have elapsed since the conviction of the accused, and the Court is after that lapse of time asked to order the defendant to appear for sentence because it is alleged he has broken a condition of his recognizance by not being of good behaviour in that he has, as alleged, during the time already referred to, defamed the private prosecutor. It may be that the defendant has complete defences to the several alleged charges of libel, and the applicant, Roderick R. McLennan, must be left to his remedy by action or indictment against the defendant in regard to such alleged libellous charges.

The order *nisi* must be discharged. We think it is not a case for costs.

A. H. F. L.

[IN CHAMBERS.]

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RE McMILLAN v. FORTIER.

June 29.

Prohibition—Foreign Judgment on a Promissory Note—Effect of—Recovery on—Cause of Action—Division Court—Jurisdiction.

A foreign judgment against the maker of a promissory note represents a simple contract debt only and one not ascertained by the signature of the defendant; and prohibition was granted to restrain proceeding with a plaint in a division court on a foreign judgment for \$232.37 recovered on such a note where the plaintiff abandoned the excess over \$200, and sought to recover judgment for the balance.

THIS was a motion by the defendant for a writ of prohibition to the Judge of the first division court of the county of Carleton to prohibit the further proceeding with a plaint by one D. M. McMillan against one L. M. Fortier on a judgment recovered in the county court of Brandon, in the Province of Manitoba, and was argued in Chambers at the Weekly Sittings at Ottawa on 29th June, 1901, before BOYD, C.

From the affidavits filed upon the motion, it appeared that the judgment had been recovered upon a promissory note made by the defendant for the sum of \$232.37. In the plaint in the division court the plaintiff abandoned the excess over \$200.

John F. Orde, for the motion. The cause of action comes within sub-sec. (c) and not within sub-sec. (d) of sec. 72 (1) of the Division Courts Act. A foreign judgment for the purposes of an action upon it is regarded as a simple contract debt: *Westlake's Private International Law*, 3rd ed., p. 340, sec. 311; *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, at p. 159; *Hawksford v. Giffard* (1886), 12 App. Cas. 122, at p. 126. It is barred by six years under the statutes of limitations: *North v. Fisher* (1884), 6 O.R. 206. The plaintiff has his option, and may sue on the judgment or on the original cause of action: *Trevelyan v. Myers* (1895), 26 O.R. 430; *In re Henderson, Nouvion v. Freeman* (1887), 37 Ch. D. 244, at p. 250; (1889), 15 App. Cas. 1; or may sue on both: *Clergue v. Humphrey* (1900), 31 S.C.R. 66, at p. 69; but the judgment is a distinct cause of action, and is not merely evidence of the original cause of action: *Dicey on Conflict of Laws*, pp. 412-413; *Godard v. Gray* (1870), L.R. 6 Q.B. 139. The "original amount of the

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claim" is not ascertained by the signature of the defendant merely because the judgment was recovered upon a promissory note, so as to bring the claim within sub-sec. (d) of sec. 72 (1). Those words are intended to apply to a claim for a balance when a larger amount is ascertained by the defendant's signature: *Bank of Ottawa v. McLaughlin* (1883), 8 A.R. 543. The defendant's signature must be upon the very instrument sued upon: *McDermid v. McDermid* (1888), 15 A.R. 287; *Kreutziger v. Brox* (1900), 32 O.R. 418.

J. F. Smellie, contra. The fact that the judgment sued on was recovered upon a promissory note brings the case within sub-sec. (d) of sec. 72 (1). The defect in jurisdiction does not appear on the face of the proceedings: *Bicknell & Seager's Division Courts Acts*, Vol. 1, 2nd ed., p. 59. The defendant has waived the objection by appearing and obtaining an enlargement of the judgment summons: *Bicknell & Seager*, Vol. 1, 2nd ed., p. 60.

Orde, in reply. The defendant may wait until the latest stage of the proceedings before applying for prohibition: *In re Brazill v. Johns* (1893), 24 O.R. 209, at p. 213.

June 29. BOYD, C.:—The judgment for \$232.37 obtained in the county court of Manitoba by the plaintiff against the defendant has no other effect in this Province than that of a foreign judgment. That is to say, it can be enforced in the proper court of this jurisdiction as importing a legal obligation to pay the sum recovered by means of an action of debt as on a simple contract: the party plaintiff has his election either to sue on the foreign judgment or upon the original cause of action; and he may combine both in one and the same action, as was allowed in *Clergue v. Humphrey*, 31 S.C.R. 66, at p. 69; *In re Henderson, Nowvion v. Freeman*, 37 Ch. D. 244, at p. 250, and *North v. Fisher*, 6 O.R. 206.

Here the plaintiff sues on this Manitoba judgment alone, remitting \$32.37 and suing for the \$200 only in the division court. It does not appear to be within the competency of the division court to entertain such an action.

The judgment debt represents a simple contract debt only, and one not ascertained by the signature of the defendant.

The contention, ably supported by Mr. Orde, appears to me unanswerable that on the footing of a judgment no more can be sued for in the division court than in the case of an ordinary demand of debt provided for in sec. 72, sub-sec. (c), *i.e.*, up to \$100.

This objection is spread upon the face of the proceedings, and though the defendant has been very late in raising the point as to want of jurisdiction, he is not precluded from doing so by any rule of practice or procedure.

The objection prevails, and prohibition should be awarded but without costs.

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[DIVISIONAL COURT.]

LEITCH V. LEITCH.

*Mortgage—Conveyance of Land Subject to the Mortgage Reserving a Life Estate—
Right to Assignment under R.S.O. 1897, ch. 121, sec. 2, sub-secs. 1 and 2.*

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The owner of land mortgaged it and then, reserving a life estate to himself, conveyed it in fee subject to the mortgage:—

Held, that the grantee was not entitled on payment of the mortgage to an assignment of it to himself or his nominee under R.S.O. 1897, ch. 121, sec. 2, sub-secs. 1 and 2; the mortgagee having notice of the equitable right of the grantor to have his life estate relieved of the burden by payment of the mortgage.

Semble, the grantee was entitled to have the mortgage assigned in such a way that it would remain an encumbrance on the remainder in fee vested in him. Judgment of Falconbridge, C.J., affirmed.

THIS was an appeal by the plaintiff from a judgment of FALCONBRIDGE, C.J.K.B, in an action tried before him at Welland, on the 15th March, 1901, without a jury, dismissing the action with costs.

W. M. German, K.C., and *G. H. Pettet*, for the plaintiff.

J. C. Rykert, K.C., and *T. D. Cowper*, for the defendant.

March 25. FALCONBRIDGE, C.J.:—By the deed of the 15th March, 1898, David Leitch, the father of the plaintiff, and who is also the husband of defendant, granted the lands in question, and another lot, to the plaintiff in consideration of the

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sum of \$1, to hold from and after the death of the father, subject to the reservations, etc., expressed in the original grant thereof from the Crown, "and subject to the life estate of the party of the first part," *i.e.*, the father.

The deed contains the usual short form covenants.

For right to convey, "except a mortgage for \$900." This is explained and admitted to mean the mortgage in question for \$600, and another mortgage for \$300 (not in question here).

For quiet enjoyment, "save the said mortgage and such life estate."

No act to encumber, "save as aforesaid."

The mortgage in question here was made to one Ann Kelly by the said David Leitch, and was assigned to the defendant by Ann Kelly's executrix before the defendant married David Leitch.

The plaintiff is ready to pay the mortgage money and interest, and has made a tender thereof accompanied by a demand of an assignment of the mortgage to himself or to a third person to be named by him, insisting that he is entitled thereto under R.S.O. 1897, ch. 121, sec. 2.

This the defendant declines to grant, but is willing to accept payment of the amount due on said mortgage and to discharge the same.

I do not think that plaintiff is entitled to insist on an assignment. The charge created by the mortgage is the proper debt of the plaintiff in consequence of the gift to him of the land subject to it. It is his duty, as between him and his father, to discharge it, and he ought not to be allowed to keep it alive as a primary charge against his father's life estate: *Blake v. Beatty* (1855), 5 Gr. 359; *Thompson v. Wilkes* (1856), 5 Gr. 594; *Teevan v. Smith* (1882), 20 Ch. D. 724.

Action dismissed with costs.

From this judgment the plaintiff appealed to a Divisional Court, and the appeal was argued on the 13th of June, 1901, before MEREDITH, C.J.C.P., MACMAHON and LOUNT, JJ.

W. M. German, K.C., for the appeal. Plaintiff is entitled to an assignment to his nominee under R.S.O. 1897, ch. 121, sec. 2, sub-secs. 1 and 2. The father is a stranger to the transac-

tion of payment by the son to the holder of the mortgage. A mortgagor entitled is defined in sec. 1, sub-sec. 4, and the son is such a mortgagor. *Teevan v. Smith*, 20 Ch. D. 724 is in plaintiff's favour, and his position here is stronger than that of the plaintiff in that case. *British Canadian Loan Co. v. Tear* (1893), 23 O.R. 664 does not apply.

T. D. Cowper, contra. The son is liable to pay off the mortgage and cannot keep it alive to the detriment of his father's life estate. See cases collected in Bicknell and Kappele, Practical Statutes, p. 606. The only kind of an assignment the plaintiff can call for is an assignment in the terms on which the holder of the mortgage would be bound to reconvey : *Teevan v. Smith*, 20 Ch. D. 724 ; *Rogers v. Wilson* (1887), 12 P.R. 322 ; (1888), *ib.* 545 ; *Thompson v. Warwick* (1894), 21 A.R. 637 ; *Muttlebury v. Taylor* (1892), 22 O.R. 312.

German, in reply.

July 23. MEREDITH, C.J.:—Appeal by the plaintiff from the judgment pronounced by the Chief Justice of the King's Bench on the 25th March, 1901, after the trial of the action before him at Welland, dismissing it with costs.

The respondent is the mortgagee of parts of lots 23 and 24 in the 6th concession of the township of Crowland. The mortgage is dated 22nd May, 1888, and was made by David Leitch, who was not then, but is now, her husband, and was then the owner of the mortgaged lands.

On the 15th March, 1898, David Leitch, the mortgagor, conveyed to the appellant, who is his son, the mortgaged lands and other lands of which he was the owner, which were subject to a mortgage for \$300.

By the conveyance David Leitch, the grantor, reserved to himself a life estate in the lands and they were conveyed subject to the existing mortgages upon them.

The appellant having required the respondent to assign the mortgage debt and convey the mortgaged premises to him, or to a nominee of his, upon the payment of the amount due upon her mortgage, which he tendered to her, and the respondent having refused to do so, this action was brought, in which the appellant claims an assignment of the mortgage either to him-

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self or to such person as he may name, and that the defendant may be compelled to execute such assignment.

It is impossible to give the relief prayed upon the present record, even if the plaintiff be otherwise entitled to such relief, for the mortgagor, David Leitch, who is interested in the mortgaged premises and entitled to redeem, is not a party to the action.

The action is in substance an action to redeem, and the rule is clear that to such an action all persons interested in the equity of redemption are necessary parties: Coote on Mortgages, 5th ed., p. 1162; *Henley v. Stone* (1840), 3 Beav. 355; *Chamberlain v. Thacker* (1849), 14 Jur. 190.

I am, however, of opinion that on the merits the appellant is not entitled to succeed. The effect of the transaction between his father and him was to make the mortgage debts as between him and his father his own, and to place upon him the obligation to pay them and to indemnify his father against them. That was clearly *primâ facie* the effect of the transaction, and no evidence was offered on the part of the appellant to shew that the transaction was not what on the face of the instrument, by which it was carried out, it purports to be.

It was decided in *Teevan v. Smith*, 20 Ch. D. 724, that the key to the statute which corresponds with our R.S.O. 1897, ch. 121, sec. 2, is to be found in the words: "instead of reconveying," and that one who is not entitled to reconveyance is not entitled to an assignment under the statute; and Lord Justice Lindley points out that a mortgagee is not bound to assign the estate after payment to the mortgagor, or his nominee, if he have notice of an equitable claim by another person on the estate: pp. 730-1.

Now in this case the respondent had notice of the equitable right of the mortgagor to have the mortgage debt paid off by the appellant, and the mortgagor's life estate relieved of the burden upon it created by the mortgage, and, that being so, the appellant was not entitled to a reconveyance, at all events, one including the life estate, and is, therefore, not entitled to an assignment under the statute.

It was argued that sub-sec. 2 of sec. 2 confers the right which the appellant claims, but I do not so understand its provisions.

In Bythewood's Precedents in Conveyancing, 4th ed., supp. 202, it is said the rule laid down in *Teévan v. Smith* is still in force, notwithstanding the Act of 1882 (which corresponds to this sub-section). The effect of the Act, it is there said, is to give legislative confirmation to that decision so far as it laid down that the expression "mortgagor" in the principal Act means the person who has, in priority to all other persons interested, the right to call upon the first mortgagee to assign the mortgage, but to leave unaffected the decision that the consent of prior mesne incumbrancers is necessary to enable a subsequent mesne incumbrancer, or the mortgagor himself, to call for a transfer in lieu of reconveyance; and in Fisher on Mortgages, 5th ed. p. 935, after pointing out that the English Act of 1881 (our first sub-section of sec. 2) did not affect the former rule that where a mortgagee has notice of a prior equitable right in a person claiming under the mortgagor he may refuse to reconvey the estate without the consent of the owner of the prior right, and the consequence flowing from that rule, it is said, is that the Act of 1882 (our second sub-section of sec. 2) does not appear to affect this interpretation, but it throws on the mortgagee the burden, which was not on him before, of determining which among several other incumbrancers, who may require an assignment, is entitled to priority.

The principle of the decision of Chitty, J., in *Alderson v. Elgey* (1884), 26 Ch. D. 567, is against the existence of the right claimed by the appellant. It was there held that the words of the section which corresponds to our sub-sec. 1, "on the terms on which he would be bound to reconvey" do not refer merely to payment of the amount of principal, interest and costs, but to "the terms" generally, and that a tenant for life of mortgaged premises who had failed to keep down the interest, and who had obtained the usual order permitting him to redeem, was not of right entitled under the Act to require the mortgagee to transfer the mortgage debt and premises to a third person. As in that case the tenant for life was not permitted to require an assignment which would preserve the mortgage as an incumbrance on the property for the interest which, as tenant for life, he was bound to pay, so here, in my opinion, the appellant is not entitled to have the mortgage in

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question assigned so as to preserve it as an incumbrance on the life estate of his father, because it is his duty to protect the life estate against the mortgage.

In my opinion, therefore, the action fails, and was properly dismissed.

Our decision will not, however, prevent the appellant if he desires to do so having the mortgage assigned in such a way that it will remain an incumbrance on the remainder in fee vested in him.

I would, therefore, dismiss the appeal with costs.

MACMAHON, and LOUNT, JJ., concurred.

G. A. B.

[IN CHAMBERS.]

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Sept. 5.

TORONTO GENERAL TRUSTS CORPORATION V. CRAIG.

Practice—Master's Report—Confirmation—Notice of Filing—Non-appearance—Rules 573, 694, 769.

Rules 694 and 769, requiring notice of filing a Master's report as a condition of its becoming absolute, are governed by Rule 573; and, therefore, notice of filing a Master's report need not be served upon a defendant who has not entered an appearance in the action; and where there is no defendant upon whom notice of filing need be served, the report becomes absolute upon the expiration of fourteen days from the filing.

MOTION by the plaintiffs in an ordinary mortgage action for a final order of foreclosure, under the circumstances mentioned in the judgment.

The motion was made *ex parte*, and was heard by Mr. Winchester, the Master in Chambers, on the 5th September, 1901.

Armour Miller, for the plaintiffs.

September 5. THE MASTER IN CHAMBERS:—The defendant did not appear to the action, and a judgment, with a reference to the Master, issued. The Master made his report, which was duly filed, but no notice of filing the same was served upon the

defendant. The question is, whether, under the circumstances, the report has become confirmed.

Rule 769 provides that "every report or certificate of a Master shall be filed and shall become absolute at the expiration of fourteen days from the date of service of notice of filing the same, unless notice of appeal is served within that time." The original Rule of which this is an amendment provided merely for the filing of the report in order to make it absolute; but the present Rule requires the service of notice of filing before it becomes absolute: see also Rule 694, which requires that "notice of the filing shall be given forthwith" after filing "by the party filing the report."

It is contended, however, that under Rule 573 notice of filing need not be given where the defendant has failed to appear in the action. It reads as follows: "Except where otherwise provided by these Rules or where otherwise ordered by the Court or a Judge, a defendant who fails to appear shall not be entitled to notice of any subsequent proceedings in the action." This is a new Rule, and was, no doubt, passed for the purpose of saving expense in serving papers upon defendants who did not wish to appear or defend. It seems to me that the subsequent Rules relating to service of papers on a non-appearing defendant must be governed by this Rule, and that in cases where a defendant does not appear, a notice of filing a Master's report need not be served upon such a defendant.

Holding this view, I must also hold, as there was no defendant upon whom a notice of filing the report need be served, that the Master's report became confirmed upon the expiration of fourteen days from the filing of the same. The final order may issue.

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July 9.

HOPKIN v. HAMILTON ELECTRIC LIGHT AND CATARACT POWER Co.

Company—Electric Light Company—R.S.O. 1897 ch. 200—Nuisance—Vibration—Injunction—Damages—R.S.O. 1897, ch. 207, secs. 9, 10, 13-20.

An electric light company incorporated under the Ontario Companies Act, R.S.O. 1897 ch. 200, purchased a piece of land adjoining plaintiff's residence and erected a transforming and distributing power house thereon. By the working of the engines so much vibration was caused in the adjoining land as to render the plaintiff's house at times almost uninhabitable, and to create a nuisance though doing no actual structural injury. The company had no compulsory powers to take lands, and no opportunity had been afforded the plaintiff of objecting to the location of its works. Moreover the company was under no compulsion to exercise its powers, nor was any statutory compensation provided for any injury of the character in question done by such exercise, nor was there any evidence that the company's powers might not have been exercised so as not to create a nuisance :—

Held, that the plaintiff was entitled to an injunction and a reference as to damages.

In their private Act, 61 Vict. ch. 68 (O), the defendants incorporated secs. 13 to 20 of the Railway Act of Ontario, R.S.O. 1897 ch. 207, relating to the expropriation of land, but omitted to incorporate sec. 9 of the last mentioned Act, by which a general power to take land is conferred, and sec. 10, by which a railway is entitled to make surveys and file a plan and book of reference :—

Held, that secs. 19 and 20 of the Railway Act of Ontario were unworkable by defendants as the powers of compulsory alienation given by sec. 20 do not arise until the map and book of reference have been deposited under sec. 10, but, assuming that secs. 9 and 10 were incorporated, as no plan or book of reference had been filed by defendants, they were without the protection afforded by the Act.

THIS was an action for an injunction to restrain a nuisance, and for damages, brought against the Hamilton Electric Light and Cataract Power Co. under the circumstances set out in the judgment of STREET, J., before whom it was tried at the Hamilton non-jury sittings on June 25th, 26th, and 28th, 1901.

D'Arcy Tate, for the plaintiff, referred to *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193; *Franklin v. People's Heat and Light Co.* (1899), 19 C.L.T. 91; *Montreal Street R.W. Co. v. Gareau* (1901), 21 C.L.T. 128; *Shelfer v. London Electric Lighting Co.*, [1895] 1 Ch. 287; *Jordeson v. Sutton*, [1898] 2 Ch. 614.

Lynch Staunton, K.C., and *W. W. Osborne*, for the defendant company, referred to *Parkdale v. West* (1887), 12 App. Cas. 602, 616; *London and Brighton R.W. Co. v. Truman*

(1885), 11 App. Cas. 45; *Hammersmith and City R.W. Co. v. Brand* (1869), L.R. 4 H.L. 171; *National Telephone Co. v. Baker*, [1893] 2 Ch. 186; *Canadian Pacific R.W. Co. v. Parke*, [1899] A.C. 535; *Wood v. Charing Cross R.W. Co.* (1863), 33 Beav. 290, 295; Joyce on Injunctions, Vol. 1, p. 497; R.S.O. 1887, ch. 207, secs. 13-20.

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July 9. STREET, J.:—The plaintiff is a married woman and owner in fee of a house and lot known as No. 366 Victoria Avenue North, in the city of Hamilton, where she lived for twenty-six years with her husband and their children. The defendants are an electric company incorporated under the Ontario Joint Stock Companies Act. They are a consolidation by letters patent under that Act of two companies, viz., “The Hamilton Electric Light and Power Co.,” and “The Cataract Power Company of Hamilton.” Before this consolidation the latter company obtained special powers under the Provincial Act, 61 Vict. ch. 68, and these passed upon the consolidation to the defendants.

The defendants during the year 1900 built a large brick building upon the parcel of land immediately adjoining the plaintiff's property, and placed within it three large engines for the purpose of transforming and distributing the electric power which they conveyed thither, in order that it might be applied for the various lighting and motive purposes of the company. The result of the working of these engines has been to create so much vibration in the adjoining land as to render the plaintiff's house, which is only thirteen feet from the defendants' building, at times almost uninhabitable, and at all times to interfere materially with the comfort and health of its inmates. The nuisance created by the defendants was so great that the plaintiff and her family finally removed from their house, and it has remained uninhabited ever since. I find, without hesitation, that the defendants have created a most serious nuisance to the plaintiff, and that their operations have resulted in materially reducing the annual, as well as the selling, value of the plaintiff's property as a residence, although so far no actual structural injury has been shewn to have taken place.

The defendants insist that by virtue of the powers granted

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to them by their letters patent and by their private Act, 61 Vict. ch. 68, they may inflict this damage upon the plaintiff without being liable to make any compensation to her.

It is needless to say that the power to inflict such a wrong must be very clearly made out before it can be sustained.

The defendants were incorporated on July 9th, 1896, and under supplementary letters patent dated May 6th, 1897, under the Joint Stock Companies Letters Patent Act, now included in the Ontario Companies Act, for the purpose of manufacturing, selling and purchasing electric power, whether generated by water power, steam, or other force, and to apply the same for any purpose or condition in which the use of electricity is employed, and to purchase and hold lands to be used in their business. As a result of such incorporation for these purposes, they obtained under sec. 3 of R.S.O. 1897 ch. 200 authority to construct, maintain, complete and operate works for the production, sale and distribution of electricity, and, subject to the consent and agreement of the municipality, to conduct the same through, under and along the streets of any municipality.

They also obtained under sec. 4 of the last mentioned Act the powers conferred upon gas and water companies under secs. 24, 25 and 26 of R.S.O. 1897 ch. 199, of carrying their wires or conductors through any part of a building owned or occupied by different persons in order to convey electricity to one or more of them; also to break up passages common to neighbouring owners or tenants, subject to the duty of making satisfaction to the owners for damage sustained by the execution of "the said powers;" also the powers contained in sec. 55 of the last mentioned Act to carry their wires or conductors through the lands of any person within ten miles of the municipality without his consent, subject to his right of compensation to be ascertained by arbitration in the manner provided in the Act. Finally, under their private Act, 61 Vict. ch. 68 (O.), the sections 13 to 20, both inclusive, of the Railway Act of Ontario are made applicable to the company and its undertakings, the word "railway" being construed to mean the works which the defendants are authorized to construct, and "land" being construed to include any privilege or easement required by the defendants.

for constructing or operating any such works. By the same Act certain by-laws of the city of Hamilton, and agreements between the defendants and the city of Hamilton, as well as with other municipalities, are ratified and declared legal and binding upon the parties. By these agreements the defendants contract with the city corporation to supply the citizens of Hamilton with electric power and light to the extent of their ability, and they were permitted to erect poles and string wires along the streets of the city, indemnifying *the City* against all damage and claims arising from their works and operations.

The defendants have not embodied in their special Act the general clause in the Railway Act which confers the general power to take lands, nor those clauses under which railways are entitled to make surveys and to file a plan and book of reference, shewing its proposed location, with the commissioner of crown lands, and providing for the delivery to various local authorities of copies thereof. The omission is important, because there is power in the 10th section of the Railway Act for persons, who object to its proposed location, to lay their grievances before the Lieutenant-Governor in Council, and an order in council may then be made if necessary, altering the proposed location. Its further importance lies in the fact that the powers of compulsory alienation given to the company by the 20th section of the Act do not arise until the map and book of reference have been deposited. The result appears to be that the 19th and 20th sections of the Railway Act cannot be worked by the defendants for lack of any authority to deposit the map, etc., and that they have no compulsory powers under the clauses of the Railway Act which apply to them, but only the powers of dealing with the owners of land who are willing to sell to them, contained in the clauses from 13 to 18 inclusive. If they had had the power to expropriate along a line laid down in a plan which they were required to file, so that any landowner might object to their proposed line, there would have been a much stronger case in their favour against a landowner who complained when their line was completed.

The question as to the liability of the defendants for the nuisance they have caused to the plaintiff seems to depend upon a consideration of their duties, their powers, and the manner in

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which their powers have been exercised, for it is worthy of remark that the numerous courts before which this question has been discussed, up to the very highest, have refrained from laying down any hard and fast general rule upon the subject. It is well established, however, on the one hand that a company obliged by law to serve the public—as a common carrier, for instance—clothed by statute with authority to do certain things, may do them at the place and in the manner authorized by the statute, without being liable to be charged with a nuisance necessarily created and without paying any compensation other than that provided by statute to persons who may be injured thereby. This is the case of *Hammersmith and City R.W. Co. v. Brand*, L.R. 4 H.L. 471, the operation of which was somewhat extended in *London and Brighton R.W. Co. v. Truman*, 11 App. Cas. 45.

On the other hand, it is equally clearly settled that a body, whether public or private, possessed of powers which are strictly permissive—that is to say, which the law will not compel it to execute, those powers being such as are capable of execution without the creation of a nuisance, and conferred without any provision being made for compensating persons injured by their exercise—is only authorized to execute them in such a manner as not to create a nuisance. This is the case of *Metropolitan Asylum District v. Hill*, 6 App. Cas. 193, followed in *Rapier v. London Tramways Co.*, [1893] 2 Ch. 588, and in *Canadian Pacific R.W. Co. v. Parke*, [1899] A.C. 535. Between these two extremes a variety of cases are to be found. See *Gas Light and Coke Co. v. Vestry of St. Mary Abbott's* (1885), 15 Q.B.D. 1; *Attorney-General v. Colney Hatch Lunatic Asylum* (1868), L.R. 4 Ch. 146; *London & North-Western R.W. Co. v. Evans*, [1893] 1 Ch. 16; *Jordeson v. Sutton*, [1898] 2 Ch. 614.

In the present case several elements may be eliminated, I think, which have been considered as of importance in the cases in which a nuisance is held to have been authorized by law. In the first place, the defendants are not by the Acts of Parliament under which they take their powers, compelled to exercise their powers. It is true they are intended to serve the public by supplying them with light, heat, and power, but they are not compellable by mandamus to do so. They have by sec. 4 of

R.S.O. 1897 ch. 200 incorporated into their charter certain clauses of the Gas Companies' Act, R.S.O. 1897, ch. 199, but clauses 28, 29, and 30 of that Act, which would have compelled them to supply the public, are not incorporated into it. Their only liability to do so arises from their contract with the city of Hamilton, which was voluntarily entered into, and is binding upon them only as a contract *inter partes*, which may at any time be cancelled by mutual agreement. The plaintiffs are by law in the same position as the *Imperial Gas Light and Coke Co.*, who were the plaintiffs in an action against one *Broadbent* (1859), 7 H.L.C. 601, with regard to whom the Lord Chancellor remarks that although they have a supposed public duty to perform, no mandamus will lie against them to compel them to perform it.

No compensation is provided by their charter or by the Acts incorporated into it for any injury they may do by the exercise of their powers, except in regard to the exercise of their right to break up streets, to conduct their wires in certain special circumstances through private property, and to break up common passages, all of which are provided for by secs. 22, 24, 25, and 26 of R.S.O. 1897 ch. 199, incorporated into their charter by sec. 4 of R.S.O. 1897 ch. 200. No compensation is provided for any injury they may do by the erection or maintenance of the works authorized under sec. 3 of their special Act, which are those here complained of. It is true that by sec. 26 of R.S.O. 1897 ch. 199, which is made part of R.S.O. 1897 ch. 200, compensation is provided to the public for all damages sustained by them in the execution of "any of the said powers," but that must be read as if the powers, the execution of which is to be the foundation of the right to compensation, were set out in the clause, and then it would be found that the only powers the exercise of which furnished any ground for compensation were those contained in secs. 22, 24, and 25 of ch. 199, and that injury arising from the exercise of the powers conferred by sec. 3 of ch. 200 is not provided for. I have already pointed out my reasons for coming to the conclusion that the right to expropriate lands without the consent of the owner is not conferred upon the defendants.

I, therefore, have as defendants a company which has no

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powers of expropriation, which is not compellable to exercise its powers, and which although permitted by law to buy lands and to erect and operate upon them works for the purposes of its business, is not expressly bound to compensate persons injured in any way by its operations. Such a company, in my opinion, is entitled only to exercise its powers in such a way as not to create a nuisance, and is liable to be enjoined if it create a nuisance, even though it could be shewn that its works could not be carried on without creating a nuisance. There are however, it appears to me, circumstances in the present case, apart from the general rules to which I have referred, disentitling the defendants to set up their powers under the charter and Acts upon which they rely.

I have stated my view of their alleged powers of expropriation under the clauses of the Railway Act, embodied in their special Act, 61 Vict. ch. 68 (O.). I think that the alleged expropriation clauses 19 and 20, upon which they rely, are unworkable, and therefore inapplicable, because of the omission to incorporate secs. 9 and 10.

If, however, I am wrong in this, and it should be held that the provisions of secs. 9 and 10 should be treated as included, then no plan or book of reference, so far as appears, has been filed, no opportunity has been given to any person to object to the proposed location of the defendants' line or works; and the defendants are therefore as to the works, which have caused the alleged nuisance, without any protection conferred by the Act, just as a railway company would be which should endeavour to construct and work its line without doing so under the Railway Acts at all.

Then, again, the place where the defendants are to erect works, and the character of the works which may be erected, are not sufficiently defined to entitle the defendants to erect them in such a manner and in such a locality as to create a nuisance. Their power is simply "to construct, maintain, complete, and operate works for the production, sale, and distribution of electricity," etc., without any limit as to the place where the works may be constructed, or the magnitude of the works to be constructed. There is nothing upon the evidence to shew that the powers conferred might not have

been so exercised as not to create a nuisance. What the defendants did was to erect three very powerful engines in a building which entirely covered the small piece of land they bought in the neighbourhood of many dwelling-houses, their building being only thirteen feet from the plaintiff's dwelling-house. Surely it is an abuse of terms to say that it was necessary for them to ruin the comfort of the plaintiff and her family, or of any other person, in order to exercise their powers. It is not shewn that by dividing the work to be done amongst several stations, instead of concentrating it all into one, the same results could not have been obtained, though possibly at a larger outlay. See remarks of Lindley, L.J., at pp. 313-4, in *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, upon a precisely similar question. And it seems clear from the evidence that the area of vibration was so small that the purchase of a somewhat larger piece of ground and the placing of the works in the middle of it would have prevented the works from injuring any third persons. To ask a railway company to buy all the land within the limits of the nuisance they cause by smoke, fire, and vibration would be prohibitive, but the same considerations do not apply to the case of isolated works such as these. See Lord Selborne's judgment in *Metropolitan District Asylum v. Hill*, 6 App. Cas. 193, at pp. 201-2, and Lord Watson's at pp. 212-3; also Lord Halsbury's judgment, p. 309, in *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287.

For these reasons, I am of opinion that the defendants are not protected against the ordinary liability for the committing of a nuisance and for the injury they have done to the plaintiff's property.

The only remaining question is as to the relief to which the plaintiff is entitled, and I think that upon this point the question is concluded by authority. The case of *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, to which I have already more than once referred, seems to me strictly in point here upon the question of the relief to which the plaintiff is entitled. I see no sound reason for exercising any discretion, even if I have any, in favour of the defendants, for it appears to me that in the present case they have exercised their

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supposed rights with a degree of disregard for those of other people, which corporations with large special powers are usually prudent enough to make some efforts to conceal.

There will, therefore, be an injunction restraining the defendants from carrying on their works so as to occasion a nuisance to the plaintiff; and, if the plaintiff desires it, a reference as to damages to be assessed under Rule 552 down to the time of the assessment. The defendants must pay the costs of the action to judgment, inclusive, including those of examination for discovery. Costs of the reference will be reserved.

The injunction is not to come into effect until October 1st next, in order that the defendants may have time to make such arrangements as will enable them to carry on their works in a manner not creating a nuisance to the plaintiff.

A. H. F. L.

[DIVISIONAL COURT.]

BONBRIGHT V. BONBRIGHT.

D. C.

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Sept. 20.

Domicil—Origin—Abandonment—Husband and Wife—Alimony—Writ of Summons—Service out of Jurisdiction—Rule 162 (c).

Held, affirming the decision of Ferguson, J., 1 O.L.R. 629, that the defendant had acquired a domicile of choice in Ontario, and had not abandoned that domicile; and, therefore, the writ of summons in an action for alimony could properly be served upon him out of Ontario, the case coming within Rule 162 (c).

AN appeal by the defendant from the order of Ferguson, J., in Chambers (1 O.L.R. 629) dismissing a motion by the defendant in an action for alimony to set aside the writ of summons and statement of claim and the service of them upon the defendant in the State of California. The motion was made upon the ground that the defendant was not "domiciled within Ontario," within the meaning of Rule 162 (c); but the Judge held that the defendant had acquired a domicile of choice in Ontario, which he had not abandoned.

The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and STREET, J., on the 3rd June, 1901.

W. R. Riddell, K.C., for the defendant. The defendant is not a British subject, and he resides at Los Angeles, California, where he was served. He cannot be served out of the jurisdiction unless he comes within some of the clauses of Rule 162. Clause (e) is excluded by *Wheeler v. Wheeler* (1895), 17 P.R. 45. There is no other possible clause except (c), which the Judge below held applicable. The Judge is in error in his findings. The defendant never had a settled place of abode in Ontario; the house at Gore's Landing was merely a summer place. Even if a domicile had been acquired in Ontario, it was abandoned, because the defendant left Ontario not intending to return. This is not a case for presuming jurisdiction, and therefore the onus is on the plaintiff. I refer to *Allen v. Allen* (1893), 15 P.R. 458; *King v. Foxwell* (1876), 3 Ch. D. 518; *In re Patience* (1885), 29 Ch. D. 976; *Wanzer Lamp Co. v. Woods* (1890), 13 P.R. 511; *Munro v. Munro* (1840), 7 Cl. & F. 842,

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at p. 876; *Udny v. Udny* (1869), L.R. 1 Sc. App. 441; *Magurn v. Magurn* (1883), 3 O.R. 570; Dicey's Law of Domicil, pp. 78, 114.

E. C. S. Huycke, for the plaintiff. The evidence shews that the house at Gore's Landing was not merely a summer residence; the husband and wife were there in the winter; they did not always spend the winter in the United States.

September 20. FALCONBRIDGE, C.J.:—I think the learned Judge is right in the conclusions which he draws from the evidence on both branches of the case, viz., that the defendant acquired a domicile of choice in Ontario, and that there was not abandonment of that domicile *animo* as well as *facto*. I have had recent occasion to consider the subject very carefully in another case.*

The appeal must be dismissed with costs.

STREET, J.:—The question to be determined is, whether the defendant was domiciled in Ontario at the time of the service upon him of the writ of summons and statement of claim in the present action. My brother Ferguson has held that he was, and I am of opinion that his decision should be sustained upon the facts appearing in the affidavits before us.

It is abundantly plain, I think, that the defendant acquired a domicile in this Province when he purchased property at Gore's Landing, and lived there with his wife, in the year 1891. That appears to have been the home and the only home of himself and his wife, and to it they regularly returned after their professional visits to the United States.

Having acquired a domicile here, he could only lose it by acquiring a new one, and this he does not appear to have done. He is at present residing in California, but residence abroad is not sufficient to effect a change of domicile unless it is accompanied by an intention to remain abroad and not to return to the former domicile. The evidence here leads me to the conclusion that the defendant's residence in California is merely for

* *Coyne v. Ryan*, decided by the Chief Justice (the trial Judge) on the 16th September, 1901. The question there concerned the estate of a deceased person, and it was determined that he had not abandoned the domicile of his birth in Ontario and acquired a new domicile in Quebec.

a temporary purpose, viz., that of obtaining a divorce from the plaintiff, whom he appears to have deserted, and of enabling him to marry another woman, and that his intention is to return to this Province when these objects have been effected.

In my opinion, the appeal should be dismissed with costs.

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[IN THE COURT OF APPEAL].

TRUSTS AND GUARANTEE COMPANY V. HART.

Gift—Undue Influence—Parent and Child—Principal and Agent.

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July 13.

In the case of a gift from a principal to an agent attacked on the ground of undue influence something more must be shewn than the mere fact that the donee was the agent of the donor, and in the absence of proof of more, the donee is not called upon to shew independent advice.

The fact in this case of the donee being the son of the donor was held not to alter the principle applicable, the son being, as was found on the evidence, the agent and business manager of the father, and the gift in question, which was made to the son as trustee for his children in consideration of services rendered by the son, was upheld.

Judgment of a Divisional Court, 31 O.R. 414, reversed.

APPEALS by the defendants, the infants, on the merits, and by the defendant, George D. Hart, on the question of costs, from the judgment of a Divisional Court (Armour, C.J., Falconbridge, and Street, JJ.), reported 31 O.R. 414, were argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., and FERGUSON, J., on the 3rd and 4th of October, 1900. The facts are stated in the report below and in the judgments in this Court.

Aylesworth, Q.C., and *William Davidson*, for the infant appellants.

C. H. Widdifield, for the appellant George D. Hart.

R. Wardrop, for the Standard Bank of Canada.

Wallace Nesbitt, Q.C., and *E. M. Young*, for the respondents.

July 13. OSLER, J.A.:—The evidence in this case, which I have considered with care, appears to me fairly to establish that the note of the 26th of December, 1889, was made and

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delivered by the deceased, James Hart, under the circumstances and for the purposes deposed to, and that the subsequent note of the 30th of December, 1895, was in like manner made and delivered by him to the defendant George Hart in renewal of, or in substitution for, the former, the latter note constituting the foundation of the deposit receipt given and received in satisfaction and discharge of it. The existence of these notes does not depend upon the testimony of the defendant George Hart and his wife alone. There is a considerable body of independent corroborative evidence, abundantly sufficient to warrant the Court in adopting the former as truthful and reliable on the main question involved, and it was accepted and acted upon by the learned trial Judge. The deposit receipt was taken at the suggestion of the deceased, and, though he did not personally sign the cheque for it, the inference is strong that he examined his bank book and was aware that it had been given, and the deposit receipt issued for the amount.

Considering the circumstances under which the notes were made, namely, that the defendant had for many years been the maker's assistant in, or manager of, his Picton business and was intended to continue as such, without any fixed remuneration for his services, I think it would be extremely difficult to maintain that the notes were gratuitous or without consideration, and did not constitute a valid claim against the maker or his estate. But take it that the deposit receipt was a gift pure and simple, and not intended as a payment or discharge of a valid claim, is it to be defeated on the ground to which effect has been given in the Court below, namely, that it was made by a principal to his agent without independent advice? The family relationship which existed between the donor and the donee is not insisted upon as calling for the application of this rule. It is boldly contended that because the son was the father's business agent or manager the gift cannot stand in the absence of proof that the principal had independent advice as to his situation and the propriety or otherwise of making it.

But I do not think the cases cited support this proposition. No special relation of trust and confidence having been shewn to have existed between the parties beyond that attaching to the mere relation of principal and agent, it appears to me that

the extent of the onus cast upon a donee occupying the situation of the defendant is to satisfy the Court of the absence of any impropriety attaching to the gift itself in the circumstances, and that the donor understood what he was doing, was not taken advantage of in any way, and was free from any undue influence exerted upon him by the donee. When the character of the donor in this case is considered—the extent of his means, his familiarity with his business and the control and oversight he was capable of exercising over it, his deliberate conduct in making the notes and his persistent and continued recognition of their existence—the requirements I have indicated would be fully satisfied. But when, in addition to that, as the evidence of Mr Widdifield, his solicitor, shews, he recognized what he had done when discussing with him the subject of his will, I am unable, with all deference, to perceive that any room remains for reasonable doubt of the validity of the gift.

I have been favoured with a perusal of the opinion prepared by my brother Moss, with which I entirely agree. The appeal should be allowed, the judgment of the Divisional Court reversed with costs of that Court and this appeal, and the judgment at the trial restored.

Moss, J.A. :—At the trial before Meredith, J., he found that the deposit receipt for \$20,000, issued by the Standard Bank on the 3rd of June, 1898, in favour of the defendant George D. Hart, represented a gift to, or settlement upon, the children of George D. Hart, made by their grandfather, James Hart, of whose estate the plaintiffs are the administrators. The learned Judge ordered that the children should be added as parties defendants, and that the \$20,000 should be paid into Court for their benefit, and he dismissed the plaintiffs' claim to the moneys without costs.

Upon appeal by the plaintiffs to a Divisional Court it was held that there subsisted such confidential relationship between the defendant George D. Hart and his father, the said James Hart, as made it necessary, in order to sustain the transaction, to shew that at the time when the deposit receipt was given James Hart had independent advice as to the nature of the

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transaction, or adopted it after the influence which George D. Hart was to be presumed to have exercised over him in bringing it about had been removed, and that these or equivalent circumstances not having been shewn the gift or settlement failed. The appeal was, therefore, allowed, and it was ordered and adjudged that the defendant George D. Hart pay to the plaintiffs the said sum of \$20,000, with interest, the amount of the deposit receipt being declared applicable to such payment, and the Standard Bank being ordered to pay over the amount represented by it to the plaintiffs. The defendant George D. Hart was also ordered to pay the costs of the plaintiffs, of the guardian of the infant defendants, and of the Standard Bank, of the action and appeal.

The main appeal is in the interest of the infant defendants, the defendant George D. Hart not claiming any beneficial interest in the \$20,000 in question. There is, however, a subsidiary appeal by him on the ground that he ought to have been awarded his costs of the action by the trial Judge, and that the Divisional Court ought to have allowed his appeal in that respect.

The deceased, James Hart, had for many years been successfully engaged in the business of a general merchant in the county of Prince Edward. Until the year 1869 his only place of business was in Demorestville, where he resided and carried on his business, being assisted therein by his two sons, the elder of whom is the defendant George D. Hart. In the year 1869 he extended his business to Picton, where he opened another shop. He went to live in Picton, being accompanied there by the defendant George D. Hart, who was then twenty-six years of age, leaving the Demorestville shop and business in charge of his second son James, who was then about twenty-four years of age. From that time until his death the two branches of the business were carried on under the conduct and management of the deceased James Hart, the annual volume or turnover at the Picton branch being much larger than that at Demorestville. In 1883 James Hart gave to George D. Hart a power of attorney authorizing him to sign cheques, accept and sign drafts and bills of exchange, receipts, and other documents, necessary for conducting James's business with the Standard

Bank at their agency in Picton, with all the usual powers in the premises. From that time to the date of James Hart's death, George D. Hart was the active manager and worker in the business, but he had no recognized share or interest therein. He was paid no stated salary, nor does it appear that he ever drew more from the cash than was needed for his personal expenses. In 1887 he married and his wife came to reside with her husband in a part of the building occupied as the shop, and they and James Hart lived together, he maintaining the establishment and the household affairs being attended to by Mrs. George Hart. In December, 1889, two children, the elder of whom was somewhat crippled and deformed, having been born, George, who was then between forty-four and forty-five years of age and had no prospects except those arising from the business in which he had then been engaged for nearly thirty years, spoke to James Hart concerning his future. He pointed out to his father that he was beginning to feel that his energies should be devoted in the direction of his family, and he suggested that as he had no tangible or visible prospects ahead of him outside of his expectations from him, his father might consent to his taking over the business in his own right. James Hart, the father, while not excepting to the view that George should think of himself and his family, was of the opinion that it would be a disadvantage to the business if he should withdraw from it—it might affect the credit or be a source of weakness with the wholesale dealers of whom they were customers. He followed this up by a statement that George could not feel a greater interest in his children than he did, and as an assurance of his wish to make special provision for them, he would give him a note for \$20,000 without interest. Accordingly he signed and delivered to George a promissory note for that amount, dated 26th of December, 1889, payable three days after date, without interest. George handed this note to his wife, who pinned it to her will, which she kept in a private drawer in the business safe, where it remained until December, 1895. In that month George drew James's attention to the fact that the note was about being outlawed, and the latter at once directed him to bring another note and he would sign it. This was done on the 30th of December, 1895, and the

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old note was handed to James, the new one being put in its place by Mrs. Hart. The execution and existence of these notes are clearly established in evidence, the testimony of the corroborating witnesses being accepted as satisfactory by the trial Judge. Several of them shew that James considered and spoke of himself as a debtor in respect of these notes to the extent of \$20,000. The evidence also shews that he was perfectly competent and capable of understanding his position. It is quite apparent that neither he nor George considered the notes as given as a merely voluntary gift for which there was no consideration whatever. They were given not only as a recognition of past valuable services, but as compensation for the years spent and to be spent by George in sustaining the burden of a business in which, as he said, he had no tangible prospects. It is not easy to say that a note given under such circumstances was without consideration and would not support a claim by action or proof against the assets of the maker if payment or proof was resisted. But although he appears on several occasions to have referred to the existence of the claim, and in such a way as to shew that he perfectly comprehended what he had done and why, he never once repudiated or shewed any desire to withdraw from the obligation. It seems impossible to ignore these facts in considering what was said and done when the deposit receipt was directed to be procured and was handed over by James Hart in substitution for the second note. Even in the case of a gift made under circumstances that throw the onus of shewing independent advice or ratification or equivalent circumstances upon the parties claiming the benefit, the object of shewing independent advice is to convince the tribunal that the act was the free uncontrolled act of the donor, done with an understanding of its nature and effect, and not brought about merely by the controlling influence of another.

The testimony of George Hart and his wife shews that the giving of the deposit receipt originated with James Hart; that all the directions for it came from him; that he deliberately examined the bank book and the receipt after it had been procured, and that he clearly and unequivocally gave his directions with regard to it. There is independent evidence to shew that on at least two occasions afterwards he examined the bank book and

the cheques and must have seen and been aware of the dealing with the bank account. It is not pretended that he was unable to attend, as he always had been in the habit of attending, to these matters at the end of each month, until during the latter part of August or the beginning of September. It is true he was in poor health, but it was shewn that notwithstanding he took a keen interest in the affairs of the business to within a short time of his death. He was also in the habit of looking after other matters of business, such as the making of loans, collecting interest, and the like. But in addition, there is the testimony of Mr. Widdifield, the solicitor to whom in August, 1898, he gave partial instructions with regard to the preparation of a will. That gentleman testified that on the 31st of August, 1898, in the course of a discussion about the disposition to be made of his estate and the proportions in which the residue was to be divided between his two sons, James said: "I have already made a large provision for George which I want to consider in making the division of the residue of the estate." The witness at first thought he referred to a farm which George had received years before, and said: "Yes, he has got the Glen farm," to which James replied: "I am not thinking of that. James (the other son) has the Whitney farm; they are about equal on that score."

This testimony, to which no reference is made in the judgment of the Divisional Court, points unmistakably to the deposit receipt and shews that, at a time when James was wholly free from any control or influence and was in confidential consultation with his solicitor and adviser, he not only recalled what he had done, but recognized and treated it as something properly done, and which he desired to confirm by taking it into consideration in making his will. And it is not to be doubted that had he ultimately made a will as he intended, he would have treated the giving of the deposit receipt as a factor in influencing his division of the remainder of his property. There is nothing to lead to the conclusion that he would have endeavoured to recall the gift or to be relieved from the settlement which he had made for the benefit of his grandchildren, and from which he could only withdraw or be relieved by shewing actual fraud, or that the circumstances were such as disabled the parties

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claiming under it from obtaining the benefit of it. Actual fraud was charged but abandoned at the trial, and there is now no pretence of want of good faith.

The position George occupied towards his father, James Hart, can be put no higher than that of agent. Their business relationship was that of principal and agent. And, apart from the agency and George's keen interest in the success of the business, and his father's confidence in his management of it, there is nothing to shew that he had acquired or exercised any special influence or dominion over his mind, or was able to direct his thoughts or his actions with regard to his property or his disposition of it. A gift from a principal to his agent, even though the agency may involve, as it did in this case, a considerable amount of confidence, does not stand on the same footing as a gift where the relationship naturally leads, or is shewn to have actually led, to the acquisition of such a dominating influence as to raise the presumption that the gift was made while the donor was not free from it.

And in the case of a gift attacked on the ground of constructive fraud, something more must be shewn than the mere fact that the donee was the agent of the donor, and in the absence of proof of more, the donee is not called upon to shew independent advice.

In *Harris v. Tremenhare* (1808), 15 Ves. 34, Lord Eldon, who had decided *Huguenin v. Baseley* and many other cases of gift to persons occupying fiduciary or confidential relations, was called upon to consider the case of dealings between a principal and his confidential agent, some in the nature of pure gifts and some in the nature of business dealings. And with regard to the gifts it was contended by Sir Samuel Romilly that it was not competent for a steward having the management of the donor's property to accept a donation from him at that time, and he also relied upon the incapacity and embarrassment of the donor, well known to the donee, who was employed by the donor not only as steward but generally in his affairs as his attorney. On the other hand it was argued for the defendant that as a general proposition it was not true that a principal cannot make a gift to an agent while the relationship subsisted.

Lord Eldon gave effect to the latter argument saying: "I cannot find any decision authorizing me to say that the defendant should not have taken these leases, as of the pure gift of his employer. . . . There is no evidence of misrepresentation, circumvention, or anything improperly leading the testator to make these leases; that they were not the spontaneous fruit of his own generosity; not weighing the value or amount of the consideration, that should have been given if it had been the subject of barter."

Re White, Kersten v. Tane (1875), 22 Gr. 547, was a case of a gift of a policy of life insurance made by a man to his brother-in-law, a clergyman, who had acted as agent for the disposal of certain personal property under a power of attorney. It was contended that the situation and relationship of the parties were such as to avoid the gift in the absence of proof of independent advice. The transaction was upheld, Blake, V.C., saying (p. 550): "There is no evidence of fraud or impropriety of any kind. . . . The defendant did not occupy to the deceased the relationship which, as laid down in *Huguenin v. Baseley*, 3 My. & K. 113, *Hunter v. Atkins*, 14 Ves. 296, and *Cooke v. Lamotte*, 15 Beav. 234, casts upon the person obtaining a benefit the necessity of proving that the grantor willingly, and knowing full well what he was about, without any exercise of the dominion or control which his position might have enabled the grantee to exercise over him, signed the instrument which evidences the gift. There is no doubt that the rule has been wisely extended so as to cover, not only the well-known instances of guardian and ward, solicitor and client, trustee and *cestui que trust*, and the like, but all cases in which, owing to the position of parties, it follows that a controlling influence may be brought to bear by the one on the other. . . . In order, however, to the invoking of this rule in one's favour, the position of the parties must be clearly defined, and nothing less than such a state of circumstances as convinces the mind, not of the actual exercise of the power, but of the opportunity of using it if the party feels so inclined, will be sufficient to shift the burden of proof, in order to the establishment of the transaction, from the grantor to the grantee." And see S.C. on rehearing, 24 Gr. 224.

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In Bowstead on Agency, 2nd ed., p. 136, it is said: "And except in the case of a solicitor and client, the general rule is that a gift *inter vivos* from principal to agent is valid if the agent proves that there was no undue influence on his part." See, also, Thornton on Gifts and Advancements, p. 451.

The evidence and the finding of the trial Judge displace any attempt at the exercise of dominion or undue influence over James Hart in the transactions in question.

It was urged that the amount of the gift was so large as to raise a presumption of fraud practised upon, or of want of proper understanding on the part of, James Hart. But, having regard to the extent of his property and means, the special nature of the claims upon him of George and his children, and bearing in mind that George was the only one of James's children who had a family, too much weight ought not to be attached to this objection. And the proved facts are such as to amply satisfy all the requirements of the law. The testimony rebuts the presumption that in making the settlement for the benefit of his grandchildren James Hart was acting under the influence or dominion of George Hart, and shews the reasonableness and fairness of the transaction under the circumstances.

I would, therefore, allow the appeal and restore the judgment of the trial Judge, but, under the circumstances, and following the ruling in *Harris v. Tremenhoe*, I would not interfere with the disposition of the costs at the trial.

The appellants should be paid their costs of the motion to the Divisional Court and of this appeal by the plaintiffs, who should also pay the Standard Bank's costs here and in the Divisional Court.

MACLENNAN, and LISTER, JJ.A., and FERGUSON, J., concurred with MOSS, J.A.

*Appeal of infants allowed, and appeal
of George D. Hart dismissed.*

R. S. C.

[IN THE COURT OF APPEAL.]

WILSON V. HOTCHKISS.

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July 13.

Company—Promoters—Principal and Agent—Fraud—Deceit.

While promoters of a company, as such, are not agents for each other, it may be shewn that one or more of them has or have been authorized to act as agent or agents for the others, and the ordinary responsibility of principals then attaches.

Therefore, where promoters who were to receive for their services paid up stock in a company to be formed, authorized two of their number to solicit subscriptions for shares, and these two, by means of false representations, induced the plaintiff to subscribe and pay for shares, the money being received and used by the promoters before the incorporation of the company, the plaintiff was held entitled to repayment by the promoters of the amount paid.

Judgment of Armour, C.J., affirmed.

AN appeal by the defendants Ellis, Milburn, and McCutcheon from the judgment at the trial, was argued before OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 1st and 2nd of October, 1900. The facts are stated in the judgment, and the line of argument is there indicated.

Shepley, Q.C., for the appellants.

Aylesworth, Q.C., and *J. M. McEvoy*, for the respondent, the plaintiff.

D. L. McCarthy, for the respondents, The Highway Advertising Company of Canada (Limited).

July 13. OSLER, J.A.:—The action is an action for deceit in procuring the plaintiff to subscribe and pay for ten shares of stock in a company promoted by the individual defendants, which was afterwards incorporated as the Highway Advertising Company of Canada (Limited).

The alleged fraud was committed by the defendants Hotchkiss and McKay, who were authorized by the other defendants to canvass for and obtain subscriptions for stock in the intended company, and consisted substantially in the statements made to the plaintiff by these two defendants that they and their co-defendants had not only between them already subscribed for \$50,000 in the stock of the company, but that the whole sum subscribed for had actually been paid into a bank for the company. Relying upon these statements as evidence of the

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soundness and practical character of the scheme and on the faith of their being true, the plaintiff subscribed for ten shares and paid over the whole amount to the defendants.

The action was commenced on the 8th of April, 1899, and was tried before the learned Chief Justice of this Court, then Chief Justice of the Queen's Bench. It appeared that the defendant Hotchkiss was the owner of a patent No. 59079, dated the 18th of February, 1898, "for new and useful improvements in advertising boards," which was intended to be operated by erecting boards for advertising purposes throughout the roads and highways of the Dominion. He persuaded the defendants Ellis, Milburn, McCutcheon, Willoughby, and McKay to interest themselves with him in promoting a joint stock company for the purpose of acquiring and operating the patent. On the 13th of April, 1898, a meeting, at which all of the defendants were present, was held in Toronto for the purpose of considering the question of organization. A resolution was passed that a solicitor should be instructed to apply for a charter of incorporation of a joint stock company to be known as "The Highway Advertising Company of Canada, Limited," of which the defendants, by the same resolution, agreed to become the provisional directors, meaning thereby the directors pending its incorporation.

On the 18th of April, 1898, a special meeting "of the provisional board of directors" of the company was held, at which the defendants Ellis, Milburn, McKay and Hotchkiss were present, McCutcheon and Willoughby being represented by proxy. Officers were elected, Ellis being appointed president; Milburn, vice-president; Willoughby, secretary-treasurer; and Hotchkiss, managing director. The distribution of "promotion stock" was agreed upon, viz., \$35,000 to defendants Hotchkiss, Willoughby, and McKay, and \$5000 each to the directors Ellis, Milburn and McCutcheon. The balance of the capital stock (the total amount of which had not, up to this time, been mentioned in the minutes) "to be sold at par and placed in the treasury to the credit of the company."

It was further agreed that Ellis, Milburn and McCutcheon should advance a "certain" unnamed sum in cash to provide for present necessary expenses. It was also agreed that "we

open an account at the Bank of Nova Scotia, Canada Life Building, City."

The minutes of the same meeting also record that "Dr. Willoughby submitted a draft for a prospectus in view of offering the balance of our capital stock for sale at par, which was approved." An account was accordingly opened in the name of the intended company, and the prospectus as approved was printed.

On the 20th of April, 1898, another meeting was held at which the defendants Ellis, Hotchkiss, Milburn and Willoughby were present. A resolution was passed that the salaries of the managing director and the secretary-treasurer should be \$100 per month, to date from the 1st of May, 1898, and that Hotchkiss "be authorized to secure the services of Mr. J. T. H. McKay, and other persons as may be necessary, to solicit stock subscriptions for this and local companies, and for advertisements subject to the approval of the board."

It was also resolved on the motion of the defendant Milburn, seconded by the defendant Ellis, that the mover and seconder, and McCutcheon, should each advance \$100 to meet current expenses.

Another meeting was held on the 5th of May, 1898, at which Ellis, Milburn, McCutcheon, Hotchkiss and Willoughby were present. The minutes of the last meeting were read and confirmed and certain accounts ordered to be paid.

Other meetings were held on the 21st of May and the 3rd of June, 1898. It is not necessary to refer to the proceedings which took place thereat in detail. They shew that in the meantime proceedings were pending for the incorporation of the company, arrangements being made for the commencement of business and various accounts for expenses ordered to be paid, including salaries of Hotchkiss, Willoughby, and one Armitage, and McKay, in sums varying from \$120 to \$135. Business was also being done in the way of organizing local companies in connection with the parent institution for the purchase of territorial rights at London, Woodstock, and other places.

On the 10th of June one of these local companies was organized at London, of which the plaintiff was to be the

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president. He was introduced to the defendant Hotchkiss, who suggested that he should take stock in the head company, stating that it would have to be fully paid up, as that was the only way in which the company would issue it.

It was found by the trial Judge, and it was not seriously, if at all, contested on the argument, that Hotchkiss did then represent to the plaintiff that the defendants Ellis, Milburn, McKay and McCutcheon had subscribed for \$5000 each, which was fully paid up, and at the credit of the company in the Bank of Nova Scotia in Toronto; that Hotchkiss himself had subscribed and paid up in the same way \$25,000, and that one Wilby was also a subscriber for \$5000, likewise paid up, and that, in all, \$50,000 of paid up stock had been taken. He gave the plaintiff a copy of the prospectus. It does not appear that he told him that the company had then been actually incorporated, and the prospectus states merely that it was being incorporated. The plaintiff took the prospectus away with him and read it, and afterwards appears to have made enquiries and satisfied himself as to the commercial standing of the several defendants. He met McKay on the same day (10th of June), after he had seen Hotchkiss, and McKay made statements similar to those which the plaintiff had already heard from Hotchkiss, except that he did not mention the name of the bank in which the stock subscriptions had been deposited. Immediately after this the plaintiff went away on a business trip to the Maritime Provinces, from which he returned on the 25th of July. On the 26th of July he was in Toronto. There he saw Hotchkiss and went with him to the company's office. Hotchkiss again urged him to subscribe, giving a list of the defendants who had taken stock in the company, adding the name of one Bates who had also subscribed and paid up \$3000, and of one Armitage, who had paid up \$2000. Thereupon the plaintiff subscribed for ten shares in the form attached to the prospectus. The defendant Hotchkiss then took the plaintiff to the office of the defendant Ellis, to whom he introduced him, and there was a conversation when there in Hotchkiss's presence which I pass over for the present, as the judgment below does not appear to have turned upon it. From thence Hotchkiss and the plaintiff went to the Bank of Nova Scotia,

where the plaintiff handed to Hotchkiss his cheque for \$1000, payable to "The Highway Advertising Company of Canada (Limited)" or order, asking that it might be held over until the 1st of August. He swore that he subscribed for the stock and gave his cheque on the full understanding and in the belief that every man in the board had subscribed and had actually paid in cash for \$5000 worth of stock, and on the findings, which are abundantly supported by the evidence, it must be taken that he did so on the faith of the representations to that effect made to him by the defendants Hotchkiss and McKay. These representations were in fact false, and were false to the knowledge of Hotchkiss and McKay on the 10th of June, when the plaintiff was asked to subscribe. At that date none of the defendants had agreed to take or subscribe for stock to be taken in the proposed company otherwise than as appears in the resolution of the 18th of April, and they were equally false to the knowledge of Hotchkiss on the 26th of July when the plaintiff signed the application for stock as above stated.

At the commencement of the negotiations between Hotchkiss and the other defendants, it seems to have been contemplated that the latter should become at least part owners with him of the patent, they providing the expenses incident to the incorporation and organization of the company, which was then to become the purchaser of their patent. The terms of their final agreement go beyond this. They are set forth in an instrument of the 15th of June, 1898, made between Hotchkiss (described as the vendor) of the first part, and his co-defendants (described as the purchasers) of the second part. This agreement recites that Hotchkiss was the owner of the patent; that being desirous of forming a joint stock company under the Companies Act (Canada) for the purpose of acquiring the patent and manufacturing advertising boards and advertising under the rights conferred by the patent, he had applied to the purchasers for their assistance, and that for the consideration thereafter mentioned they had agreed to apply for incorporation and to act as provisional directors of the company, and to advance all the preliminary expenses necessary for the formation and incorporation of the company down to the time of the first allotment of shares and to enable the company when formed to

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commence business. It is then agreed: (1) that the purchasers shall forthwith apply for letters of incorporation under the Act and shall be nominated (with the vendor) as the provisional directors of the company when incorporated; (2) that the purchasers shall advance all the preliminary expenses (as above mentioned), and shall indemnify the vendor against all proceedings, claims, and demands in respect thereof; (3) the vendor in consideration of the premises and of the services agreed to be performed by the purchasers, then sells and assigns to the purchasers (a) an undivided one-half interest of all his right, title, and interest in and to the patent of the 18th of February, 1898 (except as to certain specified localities), and all his right to obtain any extension thereof and his rights in such extensions; and (b) the benefit of all improvements on the invention patented and of all patents which may be obtained for such improvements; and (4) the vendor and purchasers agree to hold their respective interests in the said patent and improvements in partnership.

On the same day Hotchkiss executed a deed poll duly transferring to the other defendants a one-half interest in the patent as agreed. By a further agreement bearing even date with the last mentioned instruments, made between the several defendants (called the vendors) of the first part, and John W. Maughan as trustee for the company afterwards mentioned, of the second part, after reciting that the defendant Ellis and others are about to procure the formation under the Companies Act, R.S.C. ch. 119, and amending Acts, of a joint stock company under the name of the Highway Advertising Company of Canada (Limited), with a capital of \$75,000, divided into 750 shares of \$100 each, and that the vendors are the owners of the patent No. 59079 of the 18th of February, 1898 (excepting for certain specified countries), and that the vendors are about to sell the same to the company in consideration of \$50,000, to be paid as follows: \$45,000, part thereof to be applied in payment of the liability of the vendors respectively upon and in respect of 500 shares of the capital stock already or to be hereafter subscribed by the vendors prior to the application for incorporation of the company and the balance of \$5000 in cash, it was agreed that the vendors should sell

and that the company, when incorporated, should purchase the letters patent and improvements, etc.; (2) that as the consideration for the said sale, the company should pay the vendors \$5000 in cash and should credit the vendors with and apply the balance, being the sum of \$45,000, in payment of their liabilities upon the 500 shares of stock subscribed or to be subscribed by them, the vendors receiving credit respectively, as against the liability of each, for the following amounts: Hotchkiss, \$22,500, his liability upon 250 shares, and each of the other vendors for the sum of \$4,500, being the liability of each in respect of 50 shares subscribed or to be subscribed for prior to the incorporation of the company; (3) the purchase to be completed at or before the expiration of two months from date at the office of the company, when the sum of \$5000 cash shall be paid to the vendors, and the credit in respect of the liabilities of the vendors upon the stock shall be made; (4) upon the adoption of the agreement by the company in such manner as to render the same binding upon the company, the trustee to be discharged from all liability in respect thereof.

The proceedings for the incorporation of the company were continued, and it became necessary to satisfy the Department of the Secretary of State that at least one-half of the total amount of the proposed capital stock had been taken, and that at least ten per cent. had been deposited to the credit of the Receiver-General of Canada, and was standing at such credit in some chartered bank of Canada, as required by 61 Vict. ch. 50 (D.), amending R.S.C. ch. 119, sec. 5, sub-sec. (5), which sum, as the amending Act provides, "at any time after the signing of letters patent incorporating the applicants as a company may be returned to and for the sole use of the company" sec. 5 (b).

The six defendants raised the sum of \$5000 to pay ten per cent. of the stock taken by them by discounting their promissory note with the Bank of Nova Scotia for the amount. They deposited it to the credit of the account above referred to, "The Highway Advertising Company of Canada, Limited," in the same bank, and forwarded an accepted cheque, dated the 12th of July, signed in that name, by "J. H. C. Willoughby, Sect.-Treas.," countersigned by the defendant Ellis as president,

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in favour of the Receiver-General of Canada, or bearer, for \$5000.

On the 26th of July, 1898, the plaintiff subscribed for his stock and gave his cheque for \$1000, as already stated, which was indorsed in the name of the association by C. S. Hotchkiss, managing director, and John F. Ellis, president, and was cashed and deposited to the credit of the payees, "The Highway Advertising Company of Canada, Limited," on the 1st of August.

On the 4th of August a meeting of the promoters was held at which the defendants Ellis, McCutcheon and Hotchkiss were present, and accounts for salaries and expenses for the month of July, amounting to \$472.60, were ordered to be paid.

On the 6th of August the letters patent incorporating the company were issued, the defendants being named therein as the first or provisional directors.

The first meeting of the shareholders of the incorporated company was held on the 16th of August, 1898. The defendants were elected directors for the ensuing year. A meeting of the directors was held on the same day. Resolutions were passed adopting the agreement of the 15th of June between the vendors of the patent and Maughan the trustee: (2) for the payment of \$22,500 to Hotchkiss for his share of the purchase money of the patent to be credited on 250 shares of capital stock of the company subscribed by him, the full balance of ninety per cent. thereon in accordance with the terms of the above agreement; and (3) a similar resolution was also passed in respect of the fifty shares subscribed by each of the other defendants.

It will be readily understood from the manner in which this company was begotten and brought forth that the \$5000 which had been made to do duty as a cash payment of ten per cent. on the stock subscribed, re-appeared shortly after the return of the cheque which had been sent to the Receiver-General as the cash payment of \$5000, the balance of the purchase money to be paid by the company to the vendors of the patent. From thence it naturally returned to its source, vanishing in payment of the vendors' note from which it had derived its temporary existence.

On the 16th of August an agreement was entered into by the company and the other defendants adopting the agreement of the 15th of June, and declaring it to be binding on all parties as if the company had been in existence at the date thereof. On the same day the defendants sold and assigned the patent to the company.

At the directors' meeting of the 16th of August it was ordered that the defendants McKay, Hotchkiss and Willoughby should be repaid the sum of \$315, the amount of their preliminary expenses in connection with the organization of the London local company, and that \$100 be paid to each of the defendants Milburn, McCutcheon and Ellis in payment of the amounts advanced by them on the preliminary expenses and the formation of the company. These sums, it is needless to say, were illegally paid out of moneys at the credit of the defendant company, part of which consisted of the money which the plaintiff had paid for his shares.

Some time after the incorporation of the company, the shares which the plaintiff had agreed to take were allotted to him, but he did not discover the fraud which had been perpetrated upon him until about the 24th of January, 1899. Having failed to obtain redress by negotiation, he brought this action on the 8th of April following.

It was strongly urged by Mr. Shepley that the three appellant defendants and Hotchkiss occupied merely the situation of promoters of an intended company, and that none of them was *primâ facie*, or shewn in fact to be, the agent of the others; that the appellants were not liable for the fraud of Hotchkiss and McKay, not having authorized either of them to make the false representations on the faith of which the plaintiff subscribed and paid for his shares; and that they had not received the money paid by him and had derived no benefit from or beneficial interest therein.

The ordinary rule as to the liability of promoters for the acts of each other is thus stated by Lord Lindley in his book on the law of companies, p. 145: "The acts, statements and letters of one member of a committee formed for getting up a company cannot prejudice any other member, unless the first can be shewn to be agent of the last by some other circumstance

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than their common object." And see, also, Alger on the Law of Promoters and Promotion of Corporations (1897), secs. 233, 235; Hibbert and Rafferty, Law Relating to Company Promoters, 1898, pp. 63-64; *Capper's Case* (1851), 1 Sim. N.S. 178, 180, 181; *Reynell v. Lewis* (1846), 15 M. & W. 517.

It is a question in each case whether the party whose acts are relied upon as giving rise to a liability can be said to have been the agent of the party sought to be charged.

The promoters of the projected company were in this instance more intimately associated in carrying out their scheme than is often shewn to be the case. They organized themselves into an interim association or syndicate, of which they called themselves the directors, under the same name as that of the intended company, for the purpose of bringing about its incorporation; opened a banking account of their own in the same name, to the credit of which were deposited the moneys paid by the plaintiff and other persons in respect of shares subscribed for by them. They hired offices and furnished them, purchased material to be used in the projected business, and became the owners in partnership of the property which they intended the company, when formed, to acquire from them. At a meeting of their association, at which the appellants were present or represented, minutes of which were recorded in the book kept for the purpose, it was determined to invite subscriptions for the purchase of shares in the capital stock not allotted to the promoters, which was to be sold at par and the proceeds placed in the treasury. At another meeting, held two days afterwards, Hotchkiss and McKay were authorized by resolution to solicit subscriptions for shares. Two of the appellants were present at this meeting, and they and the third were present at the following meeting, at which the minutes of the former were read and confirmed. So far as regards the authority of Hotchkiss and McKay to procure subscriptions for shares from the plaintiff and others, I think that is sufficiently proved by these resolutions.

As regards the liability of the appellants for their fraudulent acts, I am of opinion that this is also clearly established, though I may say that I do not attach any weight to the evidence of the plaintiff as to the interview with the defendant

Ellis on the 26th of July. The conversation he deposes to is denied by the latter, and the learned trial Judge appears not to have acted upon it. It may, however, be neglected without in the least affecting the result, to which the rest of the evidence, practically undisputed by the chief delinquent, inevitably points. The case established is the ordinary one of principal and agent, and there is nothing to take it out of the general rule that the master or principal is answerable for every such wrong of his servant or agent as is committed in the course of his service and for his master's or principal's benefit, or, to speak more accurately, for his master or principal, though no express command or privity be proved: *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259; *MacKay v. Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394; *Cargill v. Bowers* (1878), 10 Ch. D. at pp. 513, 514; *Swire v. Francis* (1877), 3 App. Cas. 106; *Weir v. Bell* (1878), 3 Ex. D. 238; *British Mutual Banking Company v. Charnwood Forest R.W. Co.* (1887), 18 Q.B.D. at p. 716; *Thorne v. Heard*, [1895] A.C. at p. 502.

No company being actually in existence, the only principals were the association or syndicate, and their agents were the defendants Hotchkiss and McKay. The two latter committed the fraud of which the plaintiff complains, doubtless without the privity of the former, but in the course of and for the purpose of bringing about the act which the agents were authorized to do, and of which they and the appellants obtained the advantage.

I do not see how the defendants are relieved from liability by having handed over the plaintiff's money, or part of it, to the company afterwards formed. They chose to take it instead of leaving the plaintiff, as they should have done, to carry out with the company his agreement to take shares, and to make a new and substantive application therefor. When they received it they were the only principals to whom the plaintiff could look or had the right to look, and they deposited it to the credit of their own account, where it formed part of a fund on which they drew in order to pay debts of their association, and was in other respects treated as their own.

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The shares allotted by the company to the plaintiff—the details of this part of the transaction are not, that I can see, directly spoken of in the evidence—having been absolutely worthless, the plaintiff's right, in my opinion, is to recover from the defendants, other than the company, the amount paid by him and interest as adjudged below. The company do not appeal, and therefore that part of the judgment which directs the cancellation of the shares must stand unless the appellants desire to take an assignment thereof from the plaintiff, in which case the judgment may be varied accordingly.

Before I part with the case I wish to pointedly draw attention to the extraordinary manner in which the letters patent incorporating the defendant company were obtained, and the facility with which the regulations by which the Legislature supposes it has safeguarded the public can be evaded. Here was a company created with a nominal capital of \$75,000, of which the Government and the public are told that \$50,000 have been actually subscribed and ten per cent. thereof actually paid in cash—a company which was commencing operations with a piece of property put forward as worth \$50,000 in cash besides a large value in paid-up shares. In truth nothing was paid. All the shares subscribed by the defendants were, so far as the subscribers could provide therefor, taken as paid-up shares, and a company was created with a subscribed capital intended, so far as creditors are concerned, to be immune, in order to speculate in working a patent which it might have been thought no business man would have looked at for a moment. Whether the plan adopted for escaping from the requirement of sec. 27 of the Companies Act, R.S.C. ch. 119, that shares in the company shall be subject to the payment of the whole amount in cash, comes within the provisions of that section, remains perhaps to be seen. I have not thought it necessary to make any observations upon the manner in which the funds of the company were applied, after its incorporation, towards paying advances and claims of its promoters, as this does not affect the plaintiff's case.

The appeal will be dismissed with costs.

MACLENNAN, J.A.:—It was admitted by Mr. Shepley, counsel for the appellants Milburn, McCutcheon and Ellis, in the opening of his argument, that the representations made by the defendants Hotchkiss and McKay, by which the plaintiff was induced to take and pay for his shares, were false to the knowledge of those two persons; and his contention was that there was, when the representations were made, no relation between the appellants and Hotchkiss and McKay, or either of them, which would make the appellants responsible to the plaintiff.

The learned Chief Justice who tried the action, was of opinion that Hotchkiss and McKay were the duly appointed agents of the appellants to obtain share subscriptions, and he held them responsible for the fraudulent representations of their agents. I am of opinion, after a careful perusal of the evidence, and particularly of the minutes of the proceedings prior to the issue of the letters patent of incorporation of the company, that is to say, between the 13th of April and the 6th of August, 1898, that in soliciting the plaintiff to take shares, and procuring his consent to do so and to pay for them, Hotchkiss and McKay were acting at the request and with the authority of the appellants, so as to make the latter responsible for their misrepresentations.

The defendants were something more than mere promoters of a company. By agreement with Hotchkiss they had become the joint owners of a patent of invention, which they were intending to sell to the proposed company for \$50,000 of paid-up stock, and they intended to dispose of the remainder of the stock, \$25,000, at par, to be placed in the treasury of the company. The patent belonged to Hotchkiss alone, and the bargain between him and the others was that when the company should be incorporated Hotchkiss should receive from the company for his share of the patent 250 shares, paid up to ninety per cent., and \$2,500 in cash; and the others fifty shares each, also paid up to ninety per cent., and \$500 each in cash. Therefore, if the company should be formed and should succeed, Hotchkiss stood to get \$25,000 for his patent, and the others \$5000 a piece for nothing but their efforts in establishing the company and advancing the necessary preliminary expenses,

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estimated at about \$300. It was also agreed that the cash which the company was to pay the vendors, was to be paid on the 15th of August: see the two deeds of the 15th of June, 1898, executed by all the parties.

Such being the understanding between the parties, their first meeting was on the 13th of April, when it was agreed to employ a solicitor to procure letters patent of incorporation, and that they should all become provisional directors. The next meeting was on the 18th of April, when only Ellis, Milburn, Willoughby and Hotchkiss were present. At this meeting officers were elected—president, vice-president, secretary and treasurer, and general manager, the last office being assigned to Hotchkiss. The distribution of the stock payments for the patent was agreed to, and that the remainder of the stock should be sold at par. It was also agreed that a bank account should be opened, that arrangements should be made for the necessary printing and a suitable head office for the company. A draft prospectus was also approved of for the sale of the remainder of the capital stock at par.

On the 20th of April another meeting was held, at which the same persons were present as at the previous meeting. At this meeting suitable offices were agreed upon, the procurement of suitable furniture authorized, and the following resolutions were adopted:—

“Moved by Mr. Ellis, seconded by Mr. Milburn: That the salaries of the managing director and the secretary-treasurer shall be (\$100) one hundred dollars per month each, to date from May 1st, 1898, and that Mr. Hotchkiss shall be authorized to secure the services of Mr. J. T. H. McKay, and other persons as may be necessary, to solicit stock subscriptions for this and local companies and for advertisements, subject to the approval of the board. Carried.

Moved by Mr. Milburn, seconded by Mr. Ellis: That the mover and seconder and Mr. McCutcheon shall each advance the sum of (\$100) one hundred dollars to meet current expenses.”

The next meeting was held on the 5th of May, at which all were present but McKay. At this meeting the minutes of the previous meeting were read, and, after correction, approved, and

a report from the managing director with regard to the formation of subordinate organizations was approved, and accounts to the amount of \$155 were ordered to be paid.

The company was not incorporated until the 6th of August, 1898.

Now, I think the resolution of the 20th of April, above set forth, was quite sufficient to make both Hotchkiss and McKay agents of the appellants Ellis and Milburn, who were present and voted for it. Hotchkiss was authorized to employ McKay and such other persons as might be necessary to solicit subscriptions. It was a matter of course that Hotchkiss himself was authorized to do the same thing, for he was appointed manager with a salary to be reckoned from the 1st of May. McCutcheon was not present when that resolution was passed, but he was present on the 5th of May when the minutes of the previous meeting were approved. The plaintiff's subscription was obtained on the 10th of June, between which and the 5th of May two other meetings had been held, at one of which, on the 3rd of June, upwards of \$600 were ordered to be paid for salaries and expenses. Ellis and Milburn were present at these meetings, but McCutcheon was absent. But it is pointed out that at a meeting of shareholders on the 16th of August a resolution was carried, on the motion of Hotchkiss, seconded by McCutcheon, that the transactions of the provisional directors during the term of procuring the charter and up to that meeting should be ratified and confirmed, and the arrangements made by them carried out by the company. It is clear, therefore, that the liability of Ellis and Milburn is shared by McCutcheon. These three persons not only appointed Hotchkiss managing director, and authorized him to employ McKay to solicit subscriptions for shares, but they also agreed that he should have a salary for his services, and they advanced \$100 each for current expenses.

The plaintiff paid for his shares by a cheque for \$1000, dated the 26th of July, which Ellis and Hotchkiss indorsed as president and secretary-treasurer respectively, which was deposited to the account in the bank which they had agreed to open, and paid on the 2nd of August. I do not find that there was any other money besides this paid into the bank account

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up to that time except the \$300 contributed by the three appellants, so that the expenses and salaries which were ordered to be paid on the 5th of May and the 3rd of June must have been paid out of the plaintiff's money.

I do not think it is necessary to discuss the law applicable to the case, or the numerous authorities on the liability of promoters for the acts of each other. The subject is treated and the authorities cited in Lindley on Companies (1889), at pp. 144 and 145. Promoters, as such, are not agents for each other, but it may be shewn that one or more of them have authorized acts to be done by another or others of them, in which case, when such acts are done, they are attended by the same responsibility as in other cases. I think it is proved in this case that Hotchkiss was authorized by all the appellants to obtain the plaintiff's subscription, and that they are all responsible for the deceit which was used for that purpose.

The appeal must therefore be dismissed, but instead of a cancellation of the shares as ordered, they may be assigned to the defendants, or to whom they may appoint, on repayment of \$1000 and interest, and costs, to the plaintiff.

Moss, J.A. :—Mr. Shepley, for the appellants, did not argue that the finding of the learned Chief Justice that the plaintiff was induced by misrepresentations and deceit on the part of the defendants Hotchkiss and McKay to subscribe for shares in the projected Highway Advertising Company (Limited), was wrong. He conceded that it could not be successfully impeached, but he contended that the appellants were not liable to the plaintiff because they had neither authorized Hotchkiss or McKay to make the representations or to practise the deceit proved, nor received any benefit or profit by means of them. In other words, that in making the representations complained of Hotchkiss and McKay were not acting as agents for the appellants, and none of the money paid by the plaintiff came to the hands of the appellants, nor did they otherwise profit by it.

It was of course essential to the plaintiff's case that he should establish either that the appellants themselves were knowingly guilty of actual misrepresentations on the faith of

which he acted, or that they authorized Hotchkiss and McKay, or one of them, to act for them in obtaining the plaintiff's subscription, or that they received the plaintiff's money, or some of it, or that in some way they derived a profit or benefit from the fraud practised upon the plaintiff.

I think, upon the testimony, the plaintiff has succeeded in establishing the three latter propositions. That the appellants, while engaged with the other persons interested in the formation of a company to exploit Hotchkiss's patent, joined in appointing Hotchkiss and McKay to solicit subscriptions for shares in, as well as business for, the company is established by the written and oral testimony. That the work undertaken by Hotchkiss and McKay was intended for the benefit of the appellants, and that the misrepresentations proved were made to the plaintiff in the course of the employment, is also established.

In so appointing these persons, the appellants undertook for the absence of fraud on their part in executing the work assigned to them; and they rendered themselves liable for the frauds of these persons in the execution of the authority given. *Weir v. Bell*, 3 Ex. D. 32, and 238, upon which much reliance was placed by the appellants, was a case in which there was at the time of the alleged misrepresentations a company actually formed and in existence. The alleged misrepresentations were in respect of debentures to be issued by it, and the question of fact was whether the persons actually making the representations were agents of the company or of some of the directors, and it was held that they were the agents of the company. But the responsibility for the representations of an authorized agent was clearly recognized.

Again, in the present case the plaintiff's money was received in the form of a cheque drawn in favour of the association into which the appellants and other promoters had formed themselves pending the formation of a company. It was indorsed by Hotchkiss and one of the appellants and placed in a bank in such manner as to be subject to the control of the promoters until the company was formed, and in the meantime the bank account was drawn upon for the purposes of the promoters, including the appellants. I think there was a

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receipt of the amount by the appellants. It came to their hands as the result of Hotchkiss's and McKay's acts, done and intended for their benefit, and I do not think the subsequent transfer of the balance of the bank account to the credit of the company upon its formation relieved the appellants of the liability which their prior receipt had imposed upon them.

I think the judgment ought to be affirmed.

LISTER, J.A. :—I agree.

Appeal dismissed.

R. S. C.

[DIVISIONAL COURT.]

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 June 14.

MACDONALD V. MAIL PRINTING CO.

Defamation—Libel—"Blackmailing"—Innuendo—Onus of Proof—Contradictory Evidence—Nonsuit after Finding by Jury in Plaintiff's Favour.

The word "blackmailing" is libellous *per se* requiring no innuendo, and it does not lie upon the plaintiff to prove the falsity of the charge. For the purposes of the trial it is presumed in his favour, and the onus is on the defendant to prove it to be true if justification is pleaded.

Semble, per Boyd, C. The better view is that colloquial use has broadened the meaning of the word so that it may not have a criminal connotation.

In an action for two libels where the words used in one were not libellous *per se* and were not, fairly taken, capable of the meaning alleged in the innuendo:—

Held, that the trial Judge was right who had, after motions made for a nonsuit both at the close of the plaintiff's case, and after all the evidence was in, on which he reserved judgment, given judgment dismissing the action after a verdict was rendered by the jury in favour of the plaintiff.

But as to the other, where the truth of the charge was not admitted by the plaintiff or proved on uncontroverted evidence, and where the evidence as to the use of the word "blackmailing" was contradictory:—

Held, that it was for the jury to pass upon the evidence, and the judgment dismissing the action on the ground that there was no evidence to go to the jury should be set aside and the verdict of the jury in favour of the plaintiff restored.

Judgment of Meredith, J., 32 O.R. 163, reversed in part.

THIS was an appeal from the judgment of Meredith, J., reported in 32 O.R. 163, which was argued on the 26th February, 1901, before a Divisional Court composed of BOYD, C., and FERGUSON, J.

The two separate libels complained of, as well as the motions for a nonsuit at the close of the plaintiff's case and

after all the evidence was in at the trial, are fully set out in the former report as well as the judgment of the trial Judge subsequently delivered.

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E. F. B. Johnston, K.C., and *S. H. Bradford*, for the plaintiff. The trial Judge erred in directing a nonsuit. After the findings of the jury for the plaintiff, the trial Judge had no power to enter judgment for the defendants in direct opposition to the findings of the jury. A case may be stopped by a Judge before verdict if the words are plainly not actionable, but after verdict judgment must be entered according to the findings, and any relief must be obtained on appeal. Here the words in both libels were plainly actionable, and the jury have found that they bore a libellous meaning. As to the first libel, the facts disclosed shew that the words bore the meaning alleged in the innuendo. There was evidence to go to the jury: *Odgers' Law of Libel and Slander*, 3rd ed., p. 24, and Bl. ed., p. 437. As to the second libel, the word "blackmailing" used, imports a crime; in any case, it is defamatory. There was conflicting evidence as to the facts relied upon in justification of its use, and the jury having found for the plaintiff on this evidence, he is entitled to judgment. The defence of fair and accurate report fails. The writer merely gives the conclusions drawn by himself from the speaker's remarks and not what the speaker said: *Macdougall v. Knight* (1886), 17 Q.B.D. 636; (1889), 14 App. Cas. at p. 200. The plaintiff was not guilty of blackmail in any criminal sense: Criminal Code, sec. 406.

J. B. Clarke, K.C., contra. The trial Judge had power to reserve judgment on the motion for a nonsuit until after the jury had rendered their verdict, and then deliver judgment on the motion dismissing the action: *Adams v. Coleridge* (1884), 1 Times L.R. 84; *Floer v. Michigan Central R.W. Co.* (1900), 27 A.R. at p. 127; *Turner v. Bowley* (1896), 12 Times L.R. 402; *Rocke v. McKerrow* (1890), 24 Q.B.D. 463; *Odgers' Law of Libel and Slander*, Bl. ed., p. 437. As to the first libel, the words used are not capable of any defamatory meaning. The plaintiff's admissions establish the truth of the alleged libel and there was no conflicting evidence. As to the second libel, the word "blackmail" does not impute a crime. It is not to be

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found in the Criminal Code. Common use has broadened its meaning, and, as applied to the facts, it must have been so understood. The admissions of the plaintiff put in evidence support the plea of justification in the colloquial sense of the word "blackmail," and there was no conflicting evidence. The nonsuit was therefore right. The plea of fair and accurate report was established. Accepting the evidence for the plaintiff as to the words used, the report is fair and accurate, and there was no question for the jury.

Johnston, in reply. The points in *Adams v. Coleridge* and *Rocke v. McKerrow* were questions of privilege, and in the latter case no evidence was taken.

June 14. BOYD, C.:—The judgment in appeal is reported in 32 O.R. 163. Two libels were complained of; and, as to the first, I agree in the judgment below that the words published are not libellous, *per se*, and are not, fairly taken, capable of the meaning alleged in the innuendo.

Upon this part of the action the judgment should be affirmed with costs: *O'Brien v. Marquis of Salisbury* (1889), 54 J.P. 215.

The second libel is contained in the publication of a speech in which it is said "The speaker . . . characterized the latter's behaviour (*i.e.*, the plaintiff's) in connection with the matter as blackmailing." *Innuendo* that the plaintiff had committed a crime and was a blackmailer.

It is not essential to determine whether the term "black-mail," *per se*, imputes a crime. The better view is that colloquial use has broadened its meaning so that it may not necessarily have a criminal connotation. But, when put in writing and published, it is manifestly defamatory. Here the innuendo may be rejected, and a good cause of action remains. No innuendo is necessary as to these words: *Barrett v. Long* (1851), 3 H.L.C. 413, *per Parke*, B.

I agree with what is said in the latest American case I have found, that the term "blackmailing" is libellous *per se*: *Robertson v. Bennett* (1878), 44 N.Y. Sup. Ct. 66.

Now, it does not lie upon the plaintiff to prove the falsity of the charge; it is, for the purposes of the trial, presumed in

his favour, and the *onus* is on the defendant to prove it to be true if he pleads justification : *Belt v. Lawes* (1882), 51 L.J.Q.B. at p. 361. In this case justification is set up for a defence, and also that the report is fair and accurate.

It cannot be said on a perusal of the evidence that the plaintiff has admitted the truth of the charge or that it appears to be proved on uncontroverted evidence. First of all, in regard to the \$4,500 taken or received by the plaintiff, he says in his evidence at the trial that it only sufficed to recoup him for his expenses, *i.e.*, as an alleged custodian of the public. The effect of that evidence was a matter to be considered by the jury.

So as to the mortal word "blackmailing." There was contradictory evidence as to its being used by the speaker—the reporter affirming, and the speaker himself emphatically denying having employed it. And this again was for the jury on the fair and accurate report issue. The matter was left to the jury and no objection was made to the charge, and by their verdict they pronounced these words to be a libel and gave damages at \$50.

The question is not what the Judge would have done had he been trying the case on the evidence, or what an appellate court would do, but whether the case could be withdrawn from the jury, and in my opinion it could not be.

There was evidence to go to them upon the defence of justification, especially in regard to the use of the word "black-mail" by the speaker, and their verdict on the whole was not so utterly unreasonable as to compel the interference of the Court: *Australian Newspaper Co., Ltd., v. Bennett*, [1894] A.C. 284.

On this count the judgment should be reversed with costs, and judgment entered for \$50 damages and costs of the Court.

Costs will be set off against costs, and if necessary, against the damages also.

FERGUSON, J.:—There are two alleged libels complained of. As to the first of these, I agree in the judgment of the learned trial Judge, and I do not see that the matter involved can be better or more clearly discussed than has been done by him.

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The appeal as to this first alleged libel should, I think, be dismissed.

The other alleged libel seems to have been contained in a report by the defendants in their newspaper of a public meeting. The part of the report upon which the plaintiff laid stress is this: "The speaker gave the details of the payment to Mr. Macdonald of \$4,500, and characterized the latter's behaviour in connection with the matter as blackmailing." The innuendo laid is that the "plaintiff had committed a crime punishable by law," and that the plaintiff "was a man unworthy of any position of trust," and that the plaintiff "was a blackmailer."

As to whether or not the speaker referred to did at the meeting use in respect to the plaintiff or his conduct the word "blackmailing," the evidence is conflicting.

To this charge the defendants say in their pleading that the report was fair and accurate, that it was published without malice, that it was for the public benefit, and that it was privileged. It was a question for the jury upon the conflicting evidence to say whether or not the report was "fair and accurate" as stated by the defendants.

The defendants also plead that the said words do not bear the meaning alleged by the plaintiff, or any defamatory meaning; and, in the alternative, that the said words, in their actual and ordinary signification, are true in substance and in fact. "The said words" embrace the statement that the speaker gave the details of the payment to the plaintiff of the \$4,500 and characterized the plaintiff's conduct in connection with the matter as "*blackmailing*." And on this subject the evidence is conflicting—a gentleman belonging, as I understand, to the defendants' staff of reporters, saying that the speaker at the meeting did use the word "blackmail" or "blackmailing" in characterizing the conduct of the plaintiff, and the speaker himself saying that he did not.

I do not see that the learned discussion before us as to whether or not the word "blackmailing" expresses a crime punishable by law was material or profitable.

Any written words published are defamatory which impute to the plaintiff that he has been guilty of any crime, fraud, dishonesty, immorality, vice or dishonourable conduct, or has

been accused or suspected of such misconduct, and so too are all words which hold the plaintiff up to contempt, hatred, scorn or ridicule, and which, by thus engendering an evil opinion of him in the minds of right thinking men, tend to deprive him of friendly intercourse and society.

I cannot think there is room for doubt that an imputation or accusation put into writing and published of blackmailing, or stating in writing and publishing that a person has been accused or suspected of blackmailing, would be defamatory, even though it should be conceded that the word "blackmailing" at the present day does not necessarily mean a crime punishable by law.

An *innuendo* is not necessary. Let the *innuendo* be considered not proved and cast out. The plaintiff may then fall back upon the words actually published. This done, and the plaintiff can say to the defendant—You wrote and published of me that a speaker at a public meeting characterized my conduct upon a certain occasion as "blackmailing," and this has not been proved. The evidence is conflicting, and upon the evidence there should be the opinion and verdict of a jury. The jury were also the ones to say whether or not the publication was libellous, unless, in the opinion of the Judge, in no reading of it, could it be defamatory.

It did not rest upon the plaintiff to shew that the publication was false; the presumption in this regard was in his favour. As regards the facts respecting the \$4,500, the evidence was not all one way. The evidence of the plaintiff himself seems to deny that he got this sum or any part of it improperly, for he says that it was no more than enough to pay the expenses he had incurred. A question was here presented for the determination of the jury.

The judgment of the learned Judge is to be considered as if delivered at the close of the evidence and before the case went further. According to his judgment he would then have withdrawn the case from the jury and pronounced a nonsuit. This, I think, would have been erroneous, because, as I think, there was some evidence proper to be submitted to the jury. I think the judgment as to the second libel alleged should be reversed.

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I agree with the Chancellor as to the judgment to be entered and the disposition of the costs.

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[IN CHAMBERS.]

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RE THE GRAND TRUNK RAILWAY OF CANADA AND PETRIE.

July 17.

Arbitration and Award—Case Stated by Arbitrators—Time—Remission to Arbitrators—R.S.O. 1897, ch. 62, secs. 11 and 41.

An application to the Court by one of the parties to an arbitration, under sec. 41 of the Arbitration Act R.S.O. 1897, ch. 62, for an order directing the arbitrators to state a case for the opinion of the court as to the admissibility and relevancy of evidence before them must be made before the execution of the award, and it is too late for them to state a case under that section after the award is made.

The Court will not remit the matter to the arbitrators for reconsideration on the ground of mistake unless the mistake appears on the face of the award, or unless the mistake is admitted by the arbitrators.

Where after an award was made two of the arbitrators certified that they had admitted and considered certain evidence, the admissibility of which they considered doubtful, the Court refused to remit under sec. 11 of the above Act the matters in question in the arbitration.

Re An Arbitration between Montgomery, Jones & Co., and Liebenenthal & Co. (1898), 78 L.T.N.S. 406, specially considered.

THIS was an application by H. W. Petrie for an order remitting to certain arbitrators, appointed under the provisions of a lease between the Grand Trunk Railway of Canada and the applicant, the matters referred to the said arbitrators, and for a decision on the questions of law arising in the course of the reference and certified by two of the arbitrators for the opinion of the Court.

The application was argued in Chambers on April 29th, 1901, before MEREDITH, C.J.C.P.

It appeared that during the course of the arbitration the arbitrators received and considered certain evidence in reference to a payment of \$2,000 to Petrie, which evidence was objected to on his behalf, and gave effect to it in fixing the rent to be paid by him in their award which they subsequently made.

After the making of the award, two of the arbitrators joined in the following certificate:—

“We were appointed to determine the rate per foot per annum rental as to certain lands demised by Indenture dated 21st December, 1893, between the Grand Trunk Railway Company of Canada and H. W. Petrie in respect of a further term of twenty-one years provided for by said Indenture.

“In the course of the arbitration certain evidence was tendered on behalf of the Grand Trunk Railway as to a certain payment of \$2,000 made to Petrie and certain correspondence relating thereto, which evidence although admitted by consent of counsel on behalf of Petrie, was objected to by said counsel as not being pertinent to the matter under arbitration.

“In considering the evidence before us, we took into consideration, weighed and gave effect to said evidence so admitted and objected to as aforesaid, and but for the effect given by us to the said evidence, the rate fixed by us would not have been so high as the rate in fact fixed.

“In giving effect to the said evidence we were not without very grave doubts as to its admissibility and to its being an element proper to be considered by us in coming to a conclusion. We, however, did give effect to it notwithstanding our doubts.

“In view of our grave doubts as to the admissibility of the said evidence and of the weight (if any) to be attached to it, we give this certificate so that either party may move the Court to correct the error, if any has arisen, and to refer the matter back to us in the light of any direction which the Court may be pleased to give; and we beg to state that if the Court or Judge before whom the matter shall come shall be of opinion that any error has arisen, we shall be glad of an opportunity of reconsidering our decision and correcting such error.”

Riddell, K.C., for the applicant, contended that the matter should be remitted to the arbitrators with an expression of opinion that the evidence was improperly admitted: *McRae v. Lemay* (1890), 18 S.C.R. 280; *Green v. The Citizens' Insurance Co.* (1890), *ib.* 338 at pp. 346-7; *Dinn v. Blake* (1875), L.R. 10 C.P. 388; R.S.O. 1897, ch. 62, secs. 11, 33, 37, 45. The fact that the award had been made was not material: *In re An*

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Arbitration between Stringer and Riley Brothers, [1901] 1 Q.B. 105. And as to time, see *Baldwin v. Walsh* (1890), 20 O.R. 511; *Re Garson and Town of North Bay* (1894), 16 P.R. 179; *In re Caughell v. Brower*, 24 A.R. 142; *In re Oliver and Scott's Arbitration* (1889), 43 Ch.D. 310.

Walter Cassels, K.C., contra. The award was published more than six weeks before this application, and the arbitrators were *functus officio*: Russell's Law of Arbitration, 7th ed., p. 250; *Huyck v. Wilson* (1898), 18 P.R. 44. No appeal would lie. The evidence in question was received by consent of both parties, and was properly admitted. No application can be made without production of the award. The certificate here is of no effect. No request for a stated case was made, and the arbitrators do not ask to have the award remitted back. No new evidence is shewn to have come to light since the making of the award. I refer to Redman's Law of Awards, 3rd ed., pp. 241-243; *Allen v. Greenslade* (1875), 33 L.T.N.S. 567; *Dinn v. Blake* (1875), 44 L.J.C.P.N.S. 276; *Hodgkinson v. Fernie* (1857), 27 L.J.C.P.N.S. 66; *Re The Arbitration between the London Dock Co. and the Trustees of the Parish of Shadwell* (1862), 32 L.J.Q.B.N.S. 30; *Adams v. The Great North of Scotland R.W. Co.*, [1891] A.C. 31; *The Tabernacle Permanent Building Society v. Knight*, [1892] A.C. 298; *In re Keighley, Maxsted & Co. and Bryan, Durrant & Co.*, [1893] 1 Q.B. 405; *In re Palmer & Co. and Hosken & Co.*, [1898] 1 Q.B. 131.

Riddell, in reply.

July 17. MEREDITH, C.J.:—This is a motion on behalf of H. W. Petrie for an order remitting to the arbitrators, appointed under the provisions of a lease dated the 21st December, 1893, from the Grand Trunk Railway Company of Canada, to him, the matters referred to the arbitrators pursuant to the terms of the lease, and "for a decision on the questions of law arising in the course of the reference and stated by the said arbitrators for the opinion of the Court."

The question with which the arbitrators had to deal was the rental to be paid by the applicant for the demised premises for a further term of twenty-one years beyond the original term of

the lease, and it appears from a certificate which was given by the arbitrators after their award had been made and published, that they received evidence of a payment made to the applicant of \$2,000, and weighed and gave effect to that evidence, with the result that a higher rental was fixed by the award than would have been fixed had the evidence not been received.

Assuming in favour of the applicant that the arbitrators erred in receiving and giving effect to the evidence in question, I am of opinion that his application must nevertheless fail.

What in effect, as it seems to me, the applicant seeks is an order under sec. 41 of the Arbitration Act, R.S.O. 1897, ch. 62, directing the arbitrators to state a case for the opinion of the Court as to the admissibility and relevancy of the evidence to the admission of which he objects, or the opinion of the Court upon the matters contained in the certificate, treating it as a special case stated by the arbitrators for the opinion of the Court, and it is clear upon the authorities that it is too late to make such application and too late for the arbitrators to state a case under the section after the award has been made: *Re An Arbitration between Montgomery, Jones & Co. and Liebenthal & Co.* (1898), 78 L.T.N.S. 406.

But it was argued that the Court may, under the powers conferred by sec. 11 of the Act, remit the matters referred to the arbitrators for reconsideration, and that the case is one in which that power should be exercised.

With that contention I am unable to agree. The cases in which the Court will exercise the power of remitting the matters referred to the arbitrators for reconsideration are now well defined by the authorities.

In *Re An Arbitration between Montgomery, Jones & Co. and Liebenthal & Co.*, *supra*, the Court of Appeal agreed with the argument of counsel that there were but four grounds on which a matter can be remitted to an arbitrator for reconsideration under sec. 10 of the English Act (52 & 53 Vict., ch. 49), which corresponds with sec. 11 of our Act, viz.: (1) where the award is bad on the face of it; (2) where there has been misconduct on the part of the arbitrator; (3) where there has been an admitted mistake and the arbitrator himself asks that the matter may be remitted; (4) where additional evidence has

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been discovered after the making of the award: and this it was said was decided in the previous case of *In re Keighley, Maxsted & Co. and Bryan, Durrant & Co.*, [1893] 1 Q.B. 405; see also *In re Palmer & Co. and Hosken & Co.*, [1898] 1 Q.B. 131.

In substantial agreement with these cases is the decision of the Supreme Court of Canada in *Green v. The Citizens' Insurance Co.*, 18 S.C.R. 338.

Within none of these four classes does the applicant bring his case. The first and the third are the only ones within which it is suggested that it is brought.

It is not, however, within the first, because the mistake, assuming the decision of the arbitrators to have been erroneous, does not appear on the face of the award or in a paper forming part of or incorporated with it. That the certificate which the arbitrators have given is not such a paper is clear on principle and on authority. See *Leggo v. Young* (1855), 16 C.B. 626; *Holgate v. Killick* (1861), 7 H. & N. 418; *Lemay v. McRae* (1888), 16 O.R. 307; (1889), 16 A.R. 348; (1890), 18 S.C.R. 280.

Nor does the case come within the third class, for there is no admission by the arbitrators that any mistake has been made by them which they desire to be in a position to rectify by having the matters referred remitted to them for reconsideration. Unless the mistake is admitted, all that appears is, assuming the arbitrators' decision to be erroneous, that they have made a mistake in the law which does not appear on the face of the award; and that is clearly not a ground either for setting aside an award or remitting the matters referred for reconsideration: *Dinn v. Blake*, L.R. 10 C.P. 388; *Re An Arbitration between Montgomery, Jones & Co. and Liebenthal & Co.*, *supra*.

The application must therefore be refused with costs.

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July 18.

*Alimony—Lunatic—Admission to Asylum under R.S.O. 1897 ch. 317, sec. 12—
Removal by Wife's Relatives.*

A husband on two occasions procured the release of his wife from the Provincial lunatic asylum, where he had obtained her admission as a lunatic. After her second release she grew worse, becoming violent and dangerous, and he again applied for her admission, which was refused, the authorities declining to receive her except as a "warrant patient," whereupon he took proceedings under sec. 12 of R.S.O. 1897 ch. 317, which resulted in her being committed to gaol as a dangerous lunatic, from whence she was transferred to the asylum. The wife's relatives then applied to the Lieutenant-Governor and obtained her release, and she went to live with them, and claimed alimony in this action:—

Held, that an action therefor would not lie.

THIS was a motion by the plaintiff for judgment on the admission of facts contained in the pleadings and the examination for discovery of the defendant in an action for alimony.

The motion was argued before MEREDITH, C.J.C.P., at the Weekly Court held at Toronto on February 27th. The facts are stated in the judgment.

B. E. Swayzie, for the plaintiff.

Riddell, K.C., for the defendant.

July 18. MEREDITH, C.J.:—The manner in which the case was presented is not as satisfactory as if the case had been tried, and I had had an opportunity of hearing the evidence of the defendant given in the witness box; but, unsatisfactory as it is, I must deal with the case as best I can on the material before me.

The plaintiff is a lunatic, and sues by her next friend, and it is reasonably clear that her malady is incurable, and that it is proceeding from bad to worse.

The defendant on two occasions procured his wife to be admitted to the Provincial Lunatic Asylum at Toronto as a patient, but on each occasion applied for her release after she had been an inmate for but a short time. The defendant gives as his reason for taking this course his affection for his wife, and his unwillingness to live apart from her; and I see no reason for doubting this statement of his.

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After the wife returned for the second time she grew worse, and became violent and dangerous to those about her in consequence of homicidal tendencies which she exhibited. Upon this the defendant applied to the superintendent for her admission again to the Toronto Asylum, but the superintendent refused to receive her except as a "warrant patient," because, if so admitted, she could not be discharged except by the Lieutenant-Governor, while, if admitted, as she had previously been, she might be taken away again at the whim of the husband, and as he had twice removed her against the advice of the superintendent, it was not right that she should take the place of someone else for whom admission might be desired.

The defendant then took proceedings under R.S.O. 1897, ch. 317, sec. 12, to have his wife committed as a dangerous lunatic, in order that she might in that way gain admission to the asylum as a warrant patient; and these proceedings resulted in the wife being committed for transfer to the asylum into which she was accordingly admitted under the provisions of section 25.

The relatives of the wife were dissatisfied with her being placed and detained in the asylum, and made application to the Lieutenant-Governor for her discharge, which was granted; and on the 24th October, 1900, she was released.

The relatives have now instituted this suit for alimony on the wife's behalf; and the question is, whether, on this statement of facts, the wife is entitled to alimony.

I am of opinion that she is not.

It is said that the husband was guilty of cruelty in having his wife committed to the common gaol, where it is said she was required to wear prison garb, and to consort with the abandoned and criminal of her sex. That, having committed no offence, she should have been subjected to such treatment, was cruel and barbarous in the extreme; but the responsibility for it rests not on the plaintiff but on the Legislature and the people of this Province. What was the unfortunate husband to do? His wife was insane and a dangerous lunatic. His circumstances would not permit him to go to the expense of engaging a keeper for her, even if that would have been a wise course to take. He could not procure her admission to the

asylum unless by way of the county gaol, and so perforce he was compelled to take the proceedings which he adopted to secure that admission for her, and she was admitted to the asylum. There she was under proper restraint and discipline, her bodily health was looked after, and the evils resulting from her malady mitigated as much as possible, and she was comfortably housed, clothed and fed, quite as well, I apprehend, as she would have been at her home.

All this the relatives undertook to interfere with, and they substituted their judgment and opinions as to the proper mode of dealing with the wife for the judgment and opinion of the husband, which, in my opinion, should have been allowed to prevail. However creditable the feeling which prompted them to do what they did, their action was an unwarranted interference with the rights of the husband, and they are not entitled to require him to indemnify them for the support and maintenance of the wife, which they have voluntarily undertaken, and that is practically what they seek by this action to do.

A wife, who voluntarily leaves her husband, is of course, not entitled to alimony. What has been done with the plaintiff by her relatives amounts practically to the same thing as the wife voluntarily leaving her husband; they have, against the will of the husband, withdrawn her from the place where he had rightfully placed her, and where he was fulfilling as to her his marital duties, as far as in the circumstances and having regard to the mental condition of the wife, those duties could or ought to have been performed by him.

In my opinion the action entirely fails and must be dismissed.

G. F. H.

Meredith, C.J.

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July 20.

BENNETT V. WORTMAN.

Patent of Invention—Assignment for Limited Period—Sale Thereafter.

A person who is the assignee of a patent right for a limited period with a right of purchase, but who at the expiration of such period elects not to purchase, and re-assigns the patent, cannot thereafter sell the patented article though made during the time he was assignee, his right to make and sell being restricted to such limited period; and under the powers conferred on the Court by sec. 31 of the Patent Act, R.S.O. 1886 ch. 61, an injunction may be issued restraining such sale.

THIS was an action tried before MEREDITH, C.J.C.P., without a jury, at London, on April 12th, 1901.

U. A. Buchner, for the plaintiff.

I. F. Hellmuth (*T. H. Luscombe* with him), for the defendant.

The action was brought under a deed of assignment, made between the plaintiff and the defendant, bearing date the 21st October, 1900, whereby, in consideration of \$650 then paid by the defendant to the plaintiff, who was the owner of a patent right or invention for the improvement of sad irons for the Dominion of Canada, under letters patent dated 25th October, 1888, the plaintiff assigned, transferred and set over unto the defendant the said patent and the business connected therewith; and after four months' trial the defendant was to pay a further sum of \$928, or, in lieu of such further payment, he was at the expiration of the four months to re-assign the patent and business to the plaintiff. The defendant did not desire to carry on the business and pay the \$928, and he re-assigned the patent and business to the plaintiff.

During the four months the defendant held the patent he had manufactured a number of the sad irons, and, after the re-assignment, had still some on hand, which the plaintiff contended could not then be sold by the defendant, and on the defendant proceeding to sell, an injunction was sought by the plaintiff.

There were other questions raised in the case; but the learned Chief Justice disposed of them all, leaving only the question as to the right to sell after the re-assignment of

the patent, as to which he reserved his decision, and subsequently delivered the following judgment:—

July 20. MEREDITH, C.J.:—This action was tried before me without a jury, at London, on the 12th April last, and at the close of the argument I decided all the questions in dispute except the one as to the right of the defendant to sell the sad irons which were manufactured by him in the four months during which he was assignee of the patent granted to the plaintiff in accordance with which they were made, after the expiration of the four months, and after he had, in pursuance of his agreement with the plaintiff, having elected not to purchase the patent, re-assigned it to the plaintiff—as to which I reserved judgment.

It was argued on behalf of the defendant that a patentee has no remedy against one who sells the patented article or thing without the authority of the patentee; and in support of this argument sec. 29 of the Patent Act, R.S.C. 1886 ch. 61, which gives the right of action for an infringement, was appealed to.

It is true that the section does not use the word sell in defining the acts which are to give the right of action, the language of it being: "Every person who . . . makes, constructs or puts in practice any invention . . . or who procures such invention from any person not authorized . . . to make or use it and who uses it shall be liable . . . ;" but sec. 31 authorizes the Court or a Judge, in an action for the infringement of a patent, to make an order, on the application of the plaintiff or defendant, for an injunction restraining the opposite party from further use, manufacture or sale of the subject-matter of the patent; and, reading the two sections together, the proper conclusion is, I think, that the Legislature intended that the words "puts in practice" in sec. 29, should include selling the "subject-matter of the patent" authority to restrain which is given by sec. 31; but, however that may be, there is, I think, no doubt whatever that the Court has jurisdiction under sec. 31 to restrain the sale of the patented article by one who has no legal right to sell it, and that is the remedy which the plaintiff in this action seeks.

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Would, then, a sale by the defendant of the sad irons which he manufactured under the authority of the assignment to him of the patent, after he had re-assigned it to the plaintiff, be an infringement of the patentee's rights, and an act which, at the instance of the patentee, should be enjoined?

The answer to this question must, I think, be in the affirmative. The assignment of the patent to the defendant no doubt conferred on him the exclusive right, privilege and liberty of making, constructing and using and vending to others to be used the patented invention. The making by him of the irons which are in question was, therefore, a lawful act, but when he re-assigned the patent to the plaintiff he divested himself as to the future of all the rights which he had acquired under the previous assignment, and thereafter the exclusive right which I have mentioned became revested in the plaintiff. It is, of course, clear that, after the re-assignment to the plaintiff, the defendant had no longer any right to make or construct the patented article or thing, and in my opinion he had not thereafter the right of vending it to others to be used. The exclusive right of vending it to others was, as I have said, vested in the plaintiff, and the right being an exclusive one it follows that it could not exist in any one else. This observation does not, of course, apply to articles lawfully sold to a purchaser, for by the sale they are withdrawn indefinitely from the operation of the franchise secured by the patent.

The language of Chief Justice Taney in delivering the judgment of the Supreme Court of the United States in *Bloomer v. McQuewan* (1852), 14 How. 539, at p. 549, is apposite. In pointing out the distinction between the grant of the right to make and vend a patented machine and the grant of the right to use it, referring to the right of a grantee of the latter nature, he says: "When the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly," but in the case of a grant by the patentee of the right to make and vend (he is speaking of a sale of the exclusive privilege of making and vending it for use in a particular place), "the interest he acquires necessarily terminates at the time limited for its continuance by the law which created it."

Applying this to the facts of the case I am dealing with, it leads to the conclusion that every right granted by the plaintiff to the defendant terminated at the time limited by the contract for the continuance of the right. See also *Bloomer v. Millinger* (1863), 1 Wall. 340; *Brooks v. Bicknell* (1845), 4 McLean 64, at p. 67.

If I am right in the view I have expressed, this is an *a fortiori* case for the application of the principle of these decisions, for the sale of the patent to the defendant was a conditional one, and whether it was to be absolute depended upon the election which he should make at the expiration of the four months; and if the defendant's contention as to the extent of his right were well founded, it follows that it was open to him during the four months to make enough of the patented articles to answer the requirements of the market for them for the whole term of the patent, and to deal with them as free from the monopoly of the patent after the four months, and so in effect to appropriate to himself the whole value of the patent—for which, if he elected to purchase, according to his agreement, he was to pay in addition to what he had paid, \$920—without paying anything. It is, in my opinion, impossible to interpret the instrument on which the rights of the parties depend so as to produce such a result.

I come, therefore, to the conclusion that the plaintiff is entitled to an injunction restraining the defendant from vending to others the sad irons in his possession at the time of the re-assignment of the patent to the plaintiff; and there will be judgment accordingly.

The defendant must pay the costs of the action, except as to the matters as to which he has succeeded, and the costs of these the plaintiff must pay.

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PINHEY V. THE MERCANTILE FIRE INSURANCE CO.

July 20.

Fire Insurance—Insurance by Mortgagor—Loss Payable to Mortgagee—Release of Equity Redemption—Cessation of Mortgagor's Interest—Right of Mortgagee to Claim Insurance Moneys.

A mortgagor who had made a mortgage, under the Short Forms Act, containing a covenant to insure the mortgaged premises against fire, effected an insurance thereon with defendants, the loss, by the policy, being payable to the plaintiff, the mortgagee, as his interest might appear under the mortgage. Subsequently the mortgagor conveyed his equity of redemption to the mortgagee without the consent of the insurance company having been obtained therefor. The premises having been afterwards destroyed by fire :—

Held, that the plaintiff was not entitled to the insurance moneys, for (1) the fact of the conveyance made by the mortgagor to the plaintiff, whereby he ceased to have any interest at the time of the fire, was a good answer to the claim ; and (2), such conveyance constituted a breach of the fourth statutory condition, which provides against the insured premises being assigned without the insurance company's consent.

THIS was a motion for the hearing and disposal before trial of certain points of law raised on the pleadings which were stated in an agreement signed by the solicitors for the parties, providing that if the Court should be of opinion that the defendants were entitled to succeed on the questions so stated, the action was to be dismissed ; and that if the Court should be of the contrary opinion, judgment should be entered for the plaintiff for the amount of the claim ; and that in either case the costs should be in the discretion of the Court.

The motion was argued before MEREDITH, C.J.C.P., in the Weekly Court held at Toronto on May 23rd, 1901.

W. E. Middleton, for the plaintiff. The mortgagee can sue upon the policy in his own name, as the insurance was effected by Hudson in pursuance of the covenant contained in the mortgage, and the loss is by the policy made payable to the mortgagee : *Greet v. Citizens' Ins. Co.* (1879), 27 Gr. 121 ; (1880), 5 A.R. 596, 599 ; *Mitchell v. City of London Assurance Co.* (1888), 15 A.R. 262 ; *Bank of Hamilton v. Western Assurance Co.* (1877), 38 U.C.R. 600, 609. As to the alleged breach of the fourth statutory condition, the intention of the company was to insure the property for the benefit of both mortgagor and mortgagee. The legal title was, as the company knew, as

is shewn upon the face of the policy, in the mortgagee. The release of the equity of redemption was not a conveyance at all, but the release of the mortgagor's right to apply to a court of equity to compel a reconveyance. What the condition contemplates is a parting with the property—a conveyance to a stranger, which would be a matter affecting the title. A dealing between the mortgagor and the mortgagee is not contemplated, as this does not affect the risk: *Sands v. Standard Ins. Co.* (1878), 26 Gr. 113; (1879), 27 Gr. 167; *Bull v. North British Canadian Investment Co.* (1888), 15 A.R. 421; *Sovereign Fire Ins. Co. v. Peters* (1885), 12 S.C.R. 33. Hudson was not released from his covenant by the release of the equity, and so retained an insurable interest in the property in question: *Parsons v. Queen Ins. Co.* (1878), 29 C.P. 188; *Klein v. The Union Mutual Ins. Co.* (1882), 3 O.R. 234. Anyone having an insurable interest may, if it be so agreed, insure the whole value of the property for the benefit of all concerned, and as long as any one of those whose interest is insured retains his interest in the property, the insurers are liable to the extent of that interest, even though the interest of the part-owner effecting the policy ceases or is alienated before the loss: *Keefe v. Phoenix Ins. Co. of Hartford* (1900), 31 S.C.R. 144. Hudson was a trustee of the insurance for the mortgagee, and, so long as the interest of the *cestui que trust* continues, it is sufficient.

C. S. MacInnes, for the defendants. The mortgagee could only claim through his mortgagor, Hudson; his title was a derivative one, dependent on his mortgagor's title, and the moment his mortgagor's interest was at an end, so would his be. When Hudson conveyed all his interest in the property to the plaintiff, he necessarily ceased to have any interest in it, and so the plaintiff's interest as mortgagee also was at an end, and his claim fails: *Hoxsie v. Providence Mutual Fire Ins. Co.* (1860), 6 Rd. Id. 517, 519; *Carpenter v. Providence Washington Ins. Co.* (1842), 16 Pet. U.S. 495, 501; *Macomber v. Cambridge Mutual Fire Ins. Co.* (1851), 8 Cush. 133; *Hazzard v. Franklin Mutual Fire Ins. Co.* (1863), 7 Rd. Id. 429. Then, as to the second point. The deed of release was an assignment or alienation of property within the fourth statutory condition,

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and so rendered the policy void: *Little v. Eureka Ins. Co.* (1875), 5 Ins. L.J. 154.

July 20. MEREDITH, C.J.:—The action is on a fire insurance policy issued by the defendants under their corporate seal on the 30th April, 1897, whereby in consideration of the payment by one Hudson to the defendants of \$6, the defendants insured him against loss or damage by fire to the amount of \$500 on the building mentioned in the policy; and the defendants promised and agreed to make good “unto the said assured,” his executors, administrators or assigns, the loss in terms more fully set out in the policy. The insurance was for three years.

On the face of the policy are written these words: “Loss, if any, payable to Harold Kerkes Pinhey (the plaintiff), as his interest may appear under the mortgage.”

It does not admit of question that the term “the assured” used in the policy was intended to apply to Hudson, for, in addition to other reasons for so concluding, the building insured is said to be owned by the assured, and the property to be more fully described in the application of the assured, and the application was made by Hudson, and the building was owned by him subject to the mortgage which he had given to the plaintiff.

The mortgage from Hudson to the plaintiff is dated the 17th April, 1897, and contains a covenant by Hudson to insure the buildings on the mortgaged land to the amount of not less than \$800, and it is made in pursuance of the Act respecting Short Forms of Mortgages.

On the 13th March, 1899, the interest on the mortgage being much in arrear, Hudson by indenture of that date granted, released and confirmed to the plaintiff in fee simple the mortgaged lands.

The building insured was destroyed by fire on the 26th April, 1900. On the 29th October, 1900, Hudson assigned to the plaintiff the policy and his claim under it.

This action is now brought by the plaintiff to recover the \$500 as upon a total loss.

The two questions raised, on the determination of which, according to the agreement of the parties, the plaintiff’s right to recover is to depend, are:—

(1) Whether the fact that the assured, Albert Hudson, named in the policy had no interest in the property in question at the time of the fire is a defence in law to the action ?

(2) Whether the release of the equity of redemption by the assured, Albert Hudson, in the pleadings mentioned, and the fact that no written permission by the defendants indorsed upon the policy was obtained thereto as required by the fourth statutory condition, constitutes in law a defence to the action.

That the contract of insurance, being under seal, the plaintiff is a stranger to the covenant by the defendants which it contains, is beyond question: *Caldwell v. Stadacona Fire and Life Ins. Co.* (1883), 11 S.C.R. 212, at p. 235, *per* Strong, J., and *Mitchell v. City of London Assurance Co.* (1888), 15 O.R. 262, at p. 269. And the highest ground upon which it is possible to put the plaintiff's claim, and that it can properly be put that high may be open to doubt, is to treat the effect of what was done as being to create as between the plaintiff and the mortgagor a trust or a lien in favour of the plaintiff upon the policy moneys; and, so treating it, the plaintiff's claim was a derivative one, dependent on the existence of a claim by the assured, Hudson, on the policy being enforceable against the defendants, and liable also to be defeated, as the claim of the assured would be, by any breach on his part of the conditions of the policy which rendered the policy void: *Livingstone v. Western Ins. Co.* (1869), 16 Gr. 9; *Chishom v. Provincial Ins. Co.* (1869), 20 C.P. 11.

If I am right in this view, it follows that the plaintiff must fail, because the assured Hudson had no interest in the property insured at the time of the happening of the loss, unless there is something in the case of *Keefer v. Phoenix Ins. Co. of Hartford* (1899), 29 O.R. 394, affirmed by the Supreme Court (1900), 31 S.C.R. 144, that removes the difficulty in his way which I have pointed out, and I think there is not. All that was decided in that case was that the insured, having the legal ownership of the property but only a partial beneficial interest in it, and being a trustee as to remaining interest for a purchaser to whom he had contracted to sell, was, on the facts of that case, entitled to insure for the benefit of himself and his *cestui que*

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trust in his own name, and that he had intended to so insure, and had in fact so insured.

This has no application to the case in hand. There is no question that the whole property was insured; and the objection to the plaintiff's recovery is that, having ceased to have any interest in the property, he has no right to be indemnified for the loss sustained by its destruction by fire. Hudson was not a trustee of any interest in the property for the plaintiff, but at most a trustee for him of what he might be entitled to under its terms in the event of a loss happening.

Then, as to the second question. If there was an assignment of the property the policy became void, because, admittedly, it was made without the written permission of the defendants indorsed on the policy by an agent of the defendants duly authorized for that purpose. Then, was the conveyance of the 13th March, 1899, an assignment within the meaning of condition 4?

It was decided in *Sands v. Standard Ins. Co.*, 26 Gr. 113, affirmed on re-hearing (1879), 27 Gr. 167, that an assignment by way of mortgage was not an assignment within the meaning of condition 4: that an assignment to come within the condition must be one effecting an absolute transfer of the subject-matter—a transfer by which one party parts with all his interest, not reserving to himself any right or claim; and the same conclusion was come to by the Supreme Court of Canada in *Sovereign Fire Ins. Co. v. Peters* (1885), 12 S.C.R. 33.

Mr. Middleton relied on these cases to support an argument that the conveyance of the 13th March, 1899, was not an assignment within the meaning of the condition on which the defendants rely; but instead of supporting his argument it makes against it. The mortgage to the plaintiff, if executed after the policy was issued, would not have avoided it, because not being an absolute one by which all the interest of the insured was parted with, it would not have been an assignment within the meaning of the condition. But the conveyance of the 13th March, 1899, was an absolute conveyance, and the effect of it was to transfer the entire interest of the insured in the property to the plaintiff; and there is therefore, I think, no

escape from the conclusion that it was an assignment within the meaning of the condition. Meredith, C.J.

Both questions having been answered against the plaintiff's contention, the result is that, according to the agreement of the parties, judgment must be entered dismissing the action, and the dismissal must, I think, be with costs. 1901
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[IN CHAMBERS.]

THE EXCELSIOR LIFE INSURANCE COMPANY

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THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION,
RE FAULKNER.

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July 22.

Arbitration and Award—Insurance Policy—Provision for Appointment of Arbitrators—R.S.O. 1897 ch. 62, sec. 8 (O.).

A guarantee policy of insurance made by the defendants in favour of the plaintiffs contained a provision that if any difference should arise in the adjustment of a loss the award should be ascertained by two disinterested persons, one to be chosen by each party; and on their disagreement, the two should chose a third, the award of the majority to be sufficient. Differences having arisen, the plaintiffs appointed their arbitrator, of which they notified the defendants, and required them to appoint theirs, which they refused to do. Thereupon, the plaintiffs, acting under sec. 8 of R.S.O. 1897 ch. 62, appointed their arbitrator sole arbitrator:—

Held, that this submission properly came within the terms of the statute.

THIS was an application by The Employers' Liability Assurance Corporation, for an order setting aside the appointment of Edward Morgan, Esq., as sole arbitrator; and for an order prohibiting him from proceeding as sole arbitrator in this matter.

On June 21, 1901, the application was heard before STREET, J., in Chambers.

Aylesworth, K.C., for the application.

R. McKay, contra.

July 22. STREET, J.:—The submission is contained in a guarantee policy, issued by the applicants to the Excelsior Life

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Insurance Company, and is in the following words: "That if any difference shall arise in the adjustment of a loss the amount to be paid by the corporation shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party; and if the arbitrators are unable to agree they shall choose a third, and the award of the majority shall be sufficient."

The insurance company alleged that differences had arisen, and gave notice of the appointment of Edward Morgan, Esquire, as their arbitrator, and required the corporation to appoint an arbitrator. The corporation made no appointment and notified the insurance company that the case did not come within sec. 8 of R.S.O. 1897, ch. 62, because it was not a reference to two arbitrators. The insurance company went on, however, under that section, and appointed Mr. Morgan as sole arbitrator, and gave notice to the corporation that they had done so. The latter then gave notice of the present application.

The clause of the statute relied on by the insurance company is as follows: "Where a submission provides that the reference shall be to *two arbitrators, one to be appointed by each party*, then unless the submission expresses a contrary intention," if either party fails after notice from the other to appoint his arbitrator, the other may appoint a sole arbitrator as the insurance company has done here.

I am of opinion that the present submission is within the statute: it is originally a submission to two arbitrators, and it is only in a certain event which may not happen that more than two arbitrators are required; and, even in that event, it is part of the submission that the two arbitrators are not to refer the matter back to the parties or to drop it, but are to proceed to bring it to a termination without further reference to the parties by naming a third party to act with them.

I think the Act should be interpreted with reasonable liberality so as to include all cases fairly coming within its spirit and not excluded by its letter.

I, therefore, dismiss the motion with costs.

G. F. H.

[IN CHAMBERS.]

IN RE FROST V. McMILLEN.

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June 22.

*Prohibition—Division Courts—Transfer of Action—Order Issued Under sec. 90
Instead of sec. 91 of Act.*

Where an order was made by a division court Judge for the transfer of an action brought in that division, to the division court of another county, the order being made under the powers conferred by sec. 90 of the Division Courts Act, R.S.O. 1897 ch. 60, whereas, under the circumstances, the order should have been made under sec. 91, an order for prohibition was made prohibiting the division court to which the transfer had been made from acting under the order of transfer, without prejudice to the right to apply for an order under sec. 91.

THIS was a motion by the plaintiffs for an order for prohibition to the 6th division court of the county of Hastings, heard before STREET, J., in Chambers, on the 14th June, 1901.

The facts are stated in the judgment.

B. N. Davis, for the plaintiffs.

W. B. Milliken, for the defendant.

June 22. STREET, J.:—The plaintiffs, a company carrying on business at Toronto, sued to recover \$125 for goods sold and delivered to the defendants, and brought their action in the 1st division court for the county of York. The defendants live within the limits of the 6th division court of the county of Hastings.

The contract sued on is for the purchase by the defendants from the plaintiffs of a binder, to be shipped to them at Ivanhoe station in the county of Hastings, at the price of \$125.

The contract, if signed by the defendants, was signed at their residence, although it is dated at Toronto.

The contract contains a provision purporting to be signed by the defendants as follows:—"I agree not to rescind this order or agreement; and, in the event of any attempt to do so, or refusal to accept delivery of the machine, the company shall be entitled to recover from me in the court having jurisdiction where the Toronto office of the company is situated, such damages as it may sustain by reason thereof."

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The present action is not brought to recover damages for an attempt to rescind the agreement, nor for a refusal to accept delivery, but for the purchase money of goods sold and delivered pursuant to the contract.

There is a further provision in the contract relied on by the plaintiffs as entitling them to bring the action in Toronto, in the following words:—"I also promise and agree to furnish further security satisfactory to you at any time if required. If I fail to furnish such security when demanded, or if I make any default in payment, or should I dispose of my land or any part thereof, or of my personal property, you may then declare the whole price due and payable even before other maturity by promissory note or otherwise of the same, and suit therefor may be immediately entered, tried and finally disposed of in any court having jurisdiction where the Toronto office is located."

By the terms of the contract in question the \$125 purchase money of the machine is made payable as follows:—\$25 1st October, 1901; \$50 1st October, 1902; \$50 1st October, 1903, so that no part of it is yet due according to the terms of the contract.

Upon the application for change of venue, and after the defendants had filed a notice disputing the jurisdiction of the court, the solicitor for the plaintiffs filed an affidavit in reply to those filed by the defendants upon the motion to change the venue in which he states, as the plaintiff's cause of action, that the action is brought upon the written order of the defendants, and that the defendants have refused to accept delivery of the binder therein mentioned. The right to bring the action in Toronto, where the contract was not made, where the cause of action did not arise, where the money is not made payable, and where the defendants did not reside, only arises under the contract under certain circumstances which are not alleged to exist, and are not shewn to exist, but are in part negated by the affidavit of the plaintiff's solicitor.

The purchase money for the goods is not made payable by the contract at any particular place; and therefore there is nothing in the 90th section of the Division Courts Act, R.S.O. 1897 ch. 60, entitling the plaintiffs to sue in Toronto, for a part

of the cause of action alleged arose upon the delivery at Ivanhoe, where the defendants live, of the goods alleged to have been delivered there by the plaintiffs, and where the contract was in fact signed, if signed at all. In fact the 6th division court of Hastings is the only court in which this action could properly have been brought under the circumstances which appear.

The plaintiffs having brought their action in Toronto, the defendants applied to the Judge of the court under the 90th section of the Act to transfer the trial to the division in Hastings, and an order was made upon hearing the parties, expressly declaring on its face that it was made pursuant to the 90th section of the Act, changing the place of trial to the 6th division court, Hastings, and ordering that the trial should be held at the next sittings of that court to be holden on the 24th day of July next, subject to all rights of postponement.

I think it is clear that the 90th section of the Act has no application, because that section only applies where the "debt or money payable" is by the terms of the contract made payable at the place where the action is brought. The application should have been made under the 91st section of the Act, which applies to cases where the action is brought in the wrong division court, and authorizes the Judge to order the proceedings to be transferred to the proper court.

The effect of an order under these two sections is not the same in all respects. There is a distinction between the effect of the order under one section and that under the other upon the proceedings taken before the order, and with regard to the costs of those proceedings which renders it necessary to hold that the effect of the two sections upon the subsequent proceedings is not identical, and that the remedies under them must not be confused. It will not, therefore, do to say that the cause having now got into the proper division court may be tried there, for a confusion might result in the ultimate amount of costs to be recovered as well as in other respects, to which I have referred, arising from the fact that the Judge who made the order has made it under a section which gave him no authority to make it.

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Being of opinion, therefore, that the Judge of the 1st division court of York had no power to make the order under the 90th section, though he had full power upon proper material to make it under the 91st section, I think the plaintiffs are entitled to prohibit the transfer of the proceedings to the 6th division court of Hastings under the order which has been made, and to prohibit that court from acting upon the order which has been made in case the proceedings have been already transferred, and I so order; but this order will be without prejudice to the right of the defendants to apply for an order under section 91.

The plaintiffs have given rise to much of the trouble by entering the action in a court having no jurisdiction, and the order for prohibition will, therefore, be made without costs.

G. F. H.

[DIVISIONAL COURT.]

WILDMAN v. TAIT.

D. C.

1901

Aug. 12.

Assessment and Taxes—Sale for Taxes—Validity of Assessment—Lien for Purchase Money—R.S.O. 1897, ch. 224, sec. 218.

Section 218 of the Assessment Act, R.S.O. 1897, ch. 224, which gives a tax purchaser a lien for the purchase money paid by him and the ten per cent. thereon, has no application where the taxes have not been lawfully imposed, or where there are no taxes in arrear.

On appeal to the Divisional Court, the judgment, reported in 32 O.R. 274, was varied by holding that the lands had been validly assessed for the years 1892 and 1893, and that the defendant therefore had a lien for the amount of the purchase money to the extent of the taxes for those years, with costs and expenses, ten per cent. interest, and the taxes subsequently paid, with like interest. In other respects the judgment was affirmed.

THIS was an appeal by the defendant Magann from the judgment pronounced by MacMahon, J., on 12th November, 1900, reported in 32 O.R. 274, where the facts are fully stated.

On February 13th, before a Divisional Court composed of MEREDITH, C.J.C.P., and FALCONBRIDGE, C.J.K.B., the appeal was argued.

A. C. Macdonell, and J. T. C. Thompson, for the appellants. There was a sufficient assessment here. However, the lapse of the two years since the giving of the deed cured all the alleged defects in the sale, and the deed is now valid and cannot be set aside; but assuming the sale cannot be supported, there is, under sec. 218 of the Assessment Act, R.S.O. 1897 ch. 224, a lien for the purchase money and the ten per cent. Sec. 218 gives a lien to the tax purchaser, and sec. 222 places the purchaser under him in the same position. There was certainly a lien for the amount of the assessment for the years 1892 and 1893, for there was in fact an assessment for those years: *Charlton v. Watson* (1883), 4 O.R. 489. *Smith v. Midland R.W. Co.* (1883), 4 O.R. 494.

H. T. Beck, for the respondents. The learned judge dealt fully with the case, pointing out the many requirements of the Assessment Act, which have not been complied with, and which were conditions precedent to the land being sold. The defects are not cured by the validating sec. 204. The assessments for

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the years 1892 and 1893 stand in no better position than those for the previous years. These assessments include lands which formed no part of the lands assumed to be assessed. The lands in question only have a depth of 100 feet, while the depth assessed was 660 feet, thus including the lands of another owner: *Hill v. Macaulay* (1884), 6 O.R. 251. The point is, however, immaterial, as the lands could not be sold for the taxes for those years, the periods for which the land could be sold not having expired at the time of the sale. Sec. 218 does not apply; that section only applies where there has been a valid assessment under which there is something due.

August 12. The judgment of the Court was delivered by MEREDITH, C.J.:—Agreeing as I do entirely with the conclusion of my learned brother, and the reasons assigned by him for arriving at it, it would serve no good purpose to repeat those reasons, and I therefore confine myself to expressing my concurrence.

It was strongly urged by Mr. Macdonell that the defendant Magann was entitled to a lien on the lands for the amount of the taxes for which the treasurer assumed to sell them.

The language of sec. 218 of the Assessment Act, R.S.O. 1897, ch. 224, upon which that contention is based, is very sweeping; but it can, in my opinion, have no application to cases where the taxes have not been lawfully imposed, or where the taxes for which the land was sold were not in arrear, else in the latter case one who has paid his taxes would find his lands burdened with a charge for the amount which the municipality had wrongly claimed to be due, and the costs of the advertisement and sale to the extent of the purchase money paid by the tax purchaser, and that because the municipality had unlawfully assumed to sell his land for taxes claimed to be in arrear, when in fact none were in arrear.

The defendant Magann is therefore not entitled to the lien which he sets up in respect of the sums claimed to be due for taxes for the years 1890 and 1891, for there was in these years no valid assessment, and therefore nothing in arrear as to them; but the case as to the years 1892 and 1893 stands on a different footing, for the assessment for these years was a valid

one, and not affected by the error in the statement as to the depth of the lot, which may be rejected as *falsa demonstratio*, and the taxes for 1892 and 1893 were therefore validly imposed and in arrear at the time of the sale.

The judgment should therefore be varied by adjudging that the defendant is entitled to a lien on the lands in question for the amount of his purchase money to the extent of the taxes of 1892 and 1893, and the costs and expenses added to them and forming part of the arrears of taxes claimed to be due for which the lands were sold, with interest thereon at the rate of ten per cent. per annum from the date of the sale, and for the taxes, if any, paid by him since the sale, with interest on the amounts so paid at the same rate.

In other respects the judgment appealed from should be affirmed, and, subject to the variation which I have mentioned being made in it, the appeal must be dismissed; and as there has been partial success on both sides, the dismissal should, I think, be without costs.

The point as to the lien does not appear to have been brought clearly to the attention of my learned brother MacMahon, and as I understand his judgment, he did not deal with it.

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MURDY v. BURR.

Aug. 17.

Surrogate Court—Guardian Appointed by—Right to Pass Accounts before Surrogate Judge—63 Vict. ch. 17, sec. 18 (O.).

The Judge of a surrogate court has no authority to pass the accounts of the guardian of an infant appointed by such court. Sec. 18 of 63 Vict. ch. 17 (O.) does not apply, such guardian not being a trustee within the meaning of the section.

Held, also, that under the circumstances of this case, six per cent. interest was a fair rate to charge the guardian on the moneys in his hands.

THIS was a motion by the plaintiff in an action claiming an account of the dealings by the defendant as guardian of the person and estate of the plaintiff.

The motion was made on the pleadings and the evidence of the defendant for discovery, and was heard before MEREDITH, C.J.C.P., in the Weekly Court held at Toronto on May 23rd, 1901.

W. R. Riddell, K.C., for the plaintiff. The motion is made under Rule 616 on the admissions in the pleadings and in the examination of the defendant for discovery. There was no authority for the guardian appointed by the surrogate court passing his accounts before the Judge of that court. The Judge relied on sec. 18 of the Act of 1900, 63 Vict. ch. 17 (O.), amending sec. 28 of the Trustee Act, R.S.O. 1897, ch. 129. This section, however, does not apply to a guardian appointed by the surrogate court. It refers to a trustee appointed by a "deed, will, or other instrument in writing," and there is no such appointment here. He was appointed by an order of the surrogate court, and this is not a writing within the meaning of the statute: *Jodrell v. Jodrell* (1869), L.R. 7 Eq. 461; *Conservators of River Thames v. Commissioners of Inland Revenue* (1886), 18 Q.B.D. 279; Eng. & Am. Encyl. of Law, p. 825. But even if a writing within the Act of 1900, this does not carry the matter any further, for by sec. 72 of the Surrogate Courts Act, R.S.O. 1897, ch. 59, the accounts so passed are only binding in the absence of mistake or fraud, and there was mistake here: *Howell's Surrogate Practice*, 2nd ed.,

p. 591. The plaintiff on the evidence is entitled to an increased rate of interest. There was no power in the surrogate Judge to allow the guardian any remuneration.

Aylesworth, K.C., and *G. M. Vance*, for the defendant. The accounts here were passed under the sanction of the official guardian, who was present, and took part in the proceedings. Sec. 13 of the Act respecting infants, R.S.O. 1897, ch. 168, provides for the appointment of a guardian by the surrogate court and for his giving security by a bond for the faithful performance of his duties as such guardian, and when the ward becomes of full age, or sooner if required by the surrogate court, for rendering an account, etc. Reading this section together with the bond, there was a trust imposed on the guardian to render an account: *Howell's Surrogate Practice*, 2nd ed. pp. 298, 570, 613, 617; Rule 19 (a). There was also an appointment in writing. The order of the Court making such appointment and the bond amount to an instrument in writing: *Stroud's Judicial Dictionary*, title "instrument in writing." The guardian, therefore, comes within the meaning of sec. 18 of the Act of 1900. The surrogate Judge had the right to fix the amount of the remuneration payable to the guardian: R.S.O. 1897, ch. 129, sec. 40. Then, as to the rate of interest, the amount of six per cent. was, under the circumstances, a fair rate of interest.

August 17. MEREDITH, C.J.:—This is a motion by the plaintiff for an order that the defendant do account to the plaintiff for moneys which came into his hands as guardian of the plaintiff, notwithstanding the alleged passing of his accounts in the surrogate court of the county of Dufferin; and for an order that such alleged passing of accounts is not a defence to the action; and for judgment accordingly; and, if necessary, for an order referring the taking of the accounts to the Master in Ordinary; or for such further or other order as the plaintiff may be entitled to upon the material brought before the Court.

The defendant was on the 5th day of October, 1891, appointed by the surrogate court of the county of Dufferin guardian of the persons and estates of the plaintiff and his

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sister Martha Ann Murdy, and shortly after received \$1,333.33, to which the plaintiff and his sister were entitled in equal shares.

Martha Ann attained her majority in 1898, and thereupon the accounts of the defendant as guardian were taken before the Judge of the surrogate court of the county of Dufferin, she being present, and the plaintiff, who was still an infant, being represented by the official guardian.

Martha Ann accepted her share of the moneys in the hands of the defendant according to this accounting, and no question arises as to her share.

The plaintiff having come of age on the 7th August, 1900, made a claim on the defendant for the moneys belonging to him in his hands, and disputes arose as to the rate of interest with which the defendant was chargeable.

The defendant thereupon took out an appointment from the surrogate Judge of the county of Dufferin to pass his accounts before him, and, notwithstanding the protest of the plaintiff, who contended that the surrogate Judge had no jurisdiction in the premises, the surrogate Judge, being of opinion that he had jurisdiction, proceeded with the passing of the accounts, and found that the amount in the hands of the defendant for which he was accountable to the plaintiff was the sum of \$855.37.

That sum, and no more, the defendant was willing and offered to pay to the plaintiff, but the plaintiff refused to accept it, and accordingly brought this action in which he claims an account of the dealings by the defendant with the moneys belonging to him, and payment of what shall be found due on foot of such accounts. The defendant sets up that the accounts taken before the Judge of the surrogate court are binding on the plaintiff, and alleges his readiness and willingness and his offer to pay the plaintiff the \$855.37, which he says is all that upon a proper accounting he is liable for.

Part of the material in support of the motion is the evidence for discovery of the defendant, and, as I understood Mr. Riddell, he desired it to be treated as a motion for judgment on an admitted state of facts.

I agree with Mr. Riddell's argument that the accounts taken before the surrogate Judge do not bind the plaintiff. The

jurisdiction of the Judge of the surrogate court to take the accounts of a guardian appointed by that Court was attempted to be supported upon the authority of the Act, 63 Vict., ch. 17, sec. 18 (O.); but the cases cited by Mr. Riddell shew such a guardian is not a trustee appointed by deed, will or other instrument in writing within the meaning of the section.

The first passing of the accounts was before this Act, and unless the surrogate court had jurisdiction under the Act creating it to deal with such matters, the passing of the accounts was a wholly ineffectual proceeding, and bound no one. I am unable to find any trace of such a jurisdiction being ever claimed or exercised.

I must, therefore, hold that neither passing of the accounts is operative to bind the plaintiff.

Beyond this the only matter really in controversy is whether the defendant is in the circumstances of the case chargeable with a greater rate of interest than six per cent. per annum, which was the rate with which he was charged by the Judge of the surrogate court; and I am of opinion that he is not. It is true that the defendant did not keep the trust moneys separate from his own or invest them separately. Though he was wrong in taking the opposite course there was no fraud or misconduct practiced or intended, and the explanation given by the defendant for his taking the course which he adopted is not an unreasonable one. He appears to be a man of some means, and was in the habit of investing moneys of his own on land mortgages and otherwise. Great stress was laid by Mr. Riddell on the admission by the defendant that on certain loans which he made after his appointment as guardian, he received interest in excess of six per cent.; and Mr. Riddell sought to make the defendant liable therefore for a higher rate of interest than six per cent. with which he was charged by the surrogate court Judge. The effort, however, in my opinion, failed. The explanation given by the defendant as to the reason for the higher rates paid in these cases appears to me to be satisfactory. In some cases the loan was for a short period, and of a small sum, in others the security was a second mortgage, and in others the security was of a doubtful character. All of these are reasons why a higher rate than that on investments of an ordinary character would be charged.

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No evidence was given as to what the prevailing rate of interest in the locality in which the defendant lived, on mortgage investments such as a trustee might properly make was, but as far as one's general information on the subject of the rates of interest obtainable on such investments goes, one would probably conclude that six per cent. per annum was a very satisfactory rate.

That six per cent. per annum without rests is the most with which, on the facts of this case the defendant is chargeable, unless, as I think it has not been shewn, the defendant has received more, is well settled: *Inglis v. Beaty* (1878), 2 A.R. 453; *Re Honsburger* (1885), 10 O.R. 521; *Spratt v. Wilson* (1890), 19 O.R. 28.

There should be, therefore, in my opinion, judgment for the plaintiff for the amount found to be due to him, \$855.37, to which must be added so much of the costs of passing the accounts before the Judge of the surrogate court as has been charged against the plaintiff's share of the moneys in the hands of the defendant.

The defendant is entitled to his costs except so much of them as have been occasioned by the contention as to which he has failed: *Bate v. Hooper* (1855), 5 DeG. McN. & G. 338; *Re Honsburger, supra*.

The substantial contest was as to the liability of the defendant to account for interest at a greater rate than six per cent. per annum, and as to this he has succeeded.

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[DIVISIONAL COURT.]

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July 10.

Mandamus—Malicious Prosecution—Record of Acquittal—Clerk of the Peace—Quarter Sessions—Fiat of Attorney-General.

The books, indictments and records of the court of quarter sessions, which are in the hands of the clerk of the peace, are public documents which every one who is interested in has a right to see; and a defendant who has been tried and acquitted at the sessions is entitled to a copy of the record of acquittal, and it is not necessary to obtain the fiat of the Attorney-General therefor.

Regina v. Ivy (1874), 24 C.P. 78, and *Hewitt v. Cane* (1894), 26 O.R. 133, distinguished.

THIS was a motion by way of appeal from an order of Falconbridge, C.J.K.B., in Chambers, dismissing a motion for a prerogative writ of mandamus.

By the motion a reversal of such order was asked for, and for the issue of an order that such prerogative writ of mandamus do forthwith issue directed to John Idington, Esquire, K.C., clerk of the peace in and for the county of Perth, commanding him to deliver to the applicant, Cornelius Scully, the plaintiff in an action of *Scully v. Peters*, a record of the proceedings in the case of *The Queen v. Cornelius Scully* tried at the general sessions of the peace at Stratford, in the said county of Perth, and directing him to make and deliver to the said Cornelius Scully a certified copy of the indictment and endorsements in the said case as the same now appears in his hands; or ordering him in such other form as to such other matters in respect of the said proceedings as may seem meet; or for an order that the said John Idington, as an officer of this Court, do produce the said indictment and all other proceedings in the said case at the trial of the action of *Scully v. Peters*, and all certified copies of the records of the said proceedings in his custody or control; or that such further or other order might be made as might seem just.

The motion was addressed to the Attorney-General for Ontario, and to the said John Idington, the said clerk of the peace.

The indictment against the said Cornelius Scully was for stealing forty-one saw logs, the property of Louis Peters.

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At the trial at the sessions, the learned Judge, after hearing the evidence for the Crown, was of the opinion that there was no evidence to submit to the jury, and he directed the case to be withdrawn from them, and made the following endorsement upon the indictment: "Withdraw the case from the jury—no case—and discharge the prisoner."

An action for malicious prosecution was then brought by the said Cornelius Scully against the said Louis Peters, when a demand was made on the said clerk of the peace for a certified copy of the said indictment with the endorsements thereon, and on his refusal to furnish the same this motion was made.

On May 16th, before a Divisional Court composed of BOYD, C., and FERGUSON, J., the appeal was argued.

Arnoldi, K.C., for the appellant. The clerk of the peace is the officer of the quarter sessions having the custody of the books and indictments of the court of quarter sessions. The books and indictments are public documents. He takes possession of them as *custos rotulorum*. The appellant was entitled to have an exemplification or certified copy of the record of acquittal. Under the statute 46 Edw. III., which is in force in this country, every prisoner on his acquittal is entitled to the record of his acquittal. The fiat of the Attorney-General is not necessary: *Rex. v. Justices of Middlesex* (1834), 5 B. & Ad. 1113; *Rex v. Bowman* (1833), 6 C. & P. 101; *Caddy v. Barlow* (1827), 1 M. & R. 275, and note at p. 279; *Rex. v. Brangan* (1742), 1 Leach C.C. 27; Consol. Stat. U.C. ch. 11, sec. 10. The cases of *Regina v. Ivy* (1874), 24 C.P. 78; *O'Hara v. Dougherty* (1894), 25 O.R. 347, and *Hewitt v. Cane* (1894), 26 O.R. 133 are distinguishable. There the indictments were at the assizes, while here it is an indictment at the sessions, and the rule relied on by the Court in those cases was a rule of the Old Bailey which only applied to that Court.

John R. Cartwright, K.C., for the Attorney-General and the clerk of the peace. The Court are bound by the cases of *Regina v. Ivy*, 24 C.P. 78; *O'Hara v. Dougherty*, 25 O.R. 347, and *Hewitt v. Cane*, 26 O.R., 133. These cases hold that it is essential to procure the fiat of the Attorney-General for the production of the record of acquittal; and the Attorney-

General has refused his fiat. There is no distinction between indictments at the sessions and those at the assizes. The clerk of the peace either holds the documents as an officer of the Crown or as an officer of the Court. If he holds them as an officer of the Crown, then the fiat of the Attorney-General is clearly necessary, and if as an officer of the Court, then it can only be produced on an order of that Court. He, however, is an officer of the Crown.

J. H. Moss, for the private prosecutor.

[The Court were of the opinion that the private prosecutor was not before them, and that he could not be properly heard, but allowed him to address the Court].

He relied on the cases referred to by Mr. Cartwright as shewing that the record could not be produced without the fiat of the Attorney-General.

July 10. *BOYD, C.*:—The present case is distinguishable from the points involved in *Regina v. Ivy*, 24 C.P. 78, and *Hewitt v. Cane*, 26 O.R. 133, because the indictment and minutes of acquittal are in the hands of the clerk of the peace, the trial being at the sessions, and not at the assizes. It is his business to make up “a record of conviction or acquittal in any case where it may be necessary,” and to make “every copy of a record required to be made by law”: R.S.O. 1897 ch. 101, pp. 1042 (38) and 1043 (43). He is the statutory custodian of these papers as a provincial officer, and he holds them in the interests of the public, and not of the Crown. Unlike the English method, where, till 1888 the clerk of the peace was appointed by justices of the sessions, the officer in Upper Canada and Ontario has been always, like the sheriff, an independent functionary appointed by the government with manifold duties, among which are those of clerkship of the court of general sessions: R.S.O. 1897 ch. 56, s. 11, etc.

The concluded proceedings of the quarter sessions are in a legal sense records, even before a record has been formally made up, and are always treated as public documents of a judicial character. They are classed under the term public records in the books upon evidence, and as such appear to be fairly and fully within the meaning of the ancient statute of the realm 46

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Edw. III., which was declaratory of the common law. That statute, though not printed till a comparatively recent date, is well recognized in English authorities and by English Judges, and though repealed in England under the English statute revision in 1871, 34 & 35 Vict., ch. 116, it is yet in force in this country by virtue of our first Constitutional Act of 1792.

The text of this statute may be found in Vol. 9, Statutes at Large (quarto), App. p. 45, and its translation in the note to *Caddy v. Barlow*, 1 M. & R. 275. It was read in open Court and discussed in 1691 before the Judges, who all agreed that it applied for purposes of evidence to all records of public character which were to be searched and exemplified for all persons of whatever record touches them in any manner, whether against the King or not: *Graham's Case* (1691), 12 How. St. Trials 646, at pp. 659-663. The matter is succinctly put in Foster's Crown Law, 3rd ed., (1792), p. 229.

Now the books and indictments and records of the quarter sessions are public documents in the hands of the clerk of the peace, which every one interested in has the right to see: *Herbert v. Ashburner* (1750), 1 Wils. 297, and *Rex v. Sheriffs of Chester* (1819), 1 Chitt. R. 476, at p. 479. They are held by the officer as trustee for such persons as it was stated by Denman, C.J., in *Rex v. Justices of Staffordshire* (1837), 6 A. & E. 84, at p. 98. "We are by no means disposed," he said, "to narrow our own authority to enforce by mandamus the production of every document of a public nature, in which any one of the King's subjects can prove himself to be interested. For such persons, indeed, every officer appointed by law to keep records ought to deem himself for that purpose a trustee."

For the purpose of pleading autrefois convict, the Queen's Bench held that the applicant had a right to have the record of the proceedings which passed at the sessions on indictment for felony made up, and to make any use of it he could: *Rex v. Justices of Middlesex*, 5 B. & Ad. 1113. This appears to be an affirmation of the like language used by Willes, C.J., in 1742, who held that every prisoner on his acquittal had an undoubted right to a copy of the record of such acquittal for any use he might think fit to make of it: *Rex v. Brangan* (1742), 1 Leach C.C. 27; and again, it is said by Mr. Justice Patteson in

Regina v. Hewes (1835), 3 A. & E. 725, at p. 732, with reference to proceedings in the sessions, that if it is necessary for the defendant to have a record made up, and the officer refused to do it, the party having the right to avail himself of the record might apply for a mandamus as in *Rex v. Justices of Middlesex*, 5 B. & Ad. 1113.

These authorities appear to be expressly in point in favour of the present application, and the later cases were not cited in *Regina v. Ivy*.

Upon the general question the present result in England is, as expressed in *Stephen on Malicious Prosecution*, that a prisoner on his acquittal has a right to receive, on demand, a copy of the record of acquittal: p. 101 (1888). The right of the subject is strenuously argued to that result by Mr. Greaves in his note to *Russell on Crimes*, 4th ed., vol. 3, 1865, p. 350. This note under his initials "C. S. G." is repeated in the last edition by Horace Smith (6th ed., 1896). And to it is added in Vol. 3, p. 464, the further note by the editor that "it seems that a person acquitted is entitled to the copy of the record as a matter of right."

See also the note of Mr. Campbell to *Legatt v. Tollervey* (1811), as reported in 12 R. R. 519, in which he says, as to the Old Bailey rule: "It has been pointed out that this order was clearly illegal, as being contrary to the statute, 46 Edw. III.," citing *Taylor on Evidence*, 9th ed., secs. 1488-9, and cases.

In *Browne v. Cumming* (1829), as reported in 5 M. & R. 118, it is said: "*Semble*, the indictée, is entitled, as of right, to a copy of the record of acquittal." See *Welch v. Clerk* (1756), Barnes R. 468, 9.

The intervention of the Attorney-General, as representing the Crown, and exercising the Royal prerogative in granting or refusing a fiat for procuring a copy of the record of acquittal, does not appear well-founded. That is undoubtedly his function in granting or refusing his fiat for writs of error, and his action therein is constitutionally conclusive: see *Re Piggott* (1868), 11 Cox C.C. 311. The duties of this high officer are grouped *sub nomine* in the *Encyclopædia of the Laws of England*, vol. 1, p. 406 (1897); but the author is silent as to any power of the Attorney-General to stay an alleged right of action for malicious prosecu-

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tion *in limine*. Rather to be deemed correct is the comment of Mr. Chitty in his *Practice of the Law*, 3rd ed., (1837), vol. 1, par. 1, p. 49, note (e): "It would be . . . monstrous . . . to prevent an acquitted defendant from trying his civil remedy for the injury to his person and character by an unfounded prosecution. A jury is the only proper jurisdiction to decide upon the propriety of the prosecution." Of course in modern practice the jury decides as to the disputed facts (if any) needful to determine whether there was reasonable and probable cause; but upon the admitted or ascertained facts the Judge himself (subject to appeal) rules as to the existence of such real and probable cause. According to the constitutional right of the subject, this commends itself as being the proper safeguard for the protection of prosecutors, and not the other method of granting or refusing a fiat for the record.

The present claim as to the fiat appears to be a survival of some ancient practice requiring the sanction of the Attorney-General before one could have access to the general records of the realm; but this has long become practically obsolete: Taylor on Evidence, 9th ed., secs. 1480-1. To extend this practice to the records of the King's Courts is contrary to the common law, for it belongs to the public of common right to procure copies of public judicial records for the purpose of being given in evidence. See note to *Caddy v. Barlow*, 1 M. & R. 275, at p. 279. It also appears to be, as stated by Taylor, directly at variance with the Act of 46 Edw. III., and to be absolutely inconsistent with the provisions of Magna Charta—*Nulli negabimus vel differemus justitiam*: Taylor on Evidence, 9th ed., vol. 2, secs. 1488-9.

In England, prior to 1888, the practice was to direct the mandamus to the justices of the sessions, because the clerk of the peace was their officer or deputy; but here he holds an independent title from the Crown, and the High Court will direct him, as the only lawful custodian of the records, to make up and exemplify the particular judgment of acquittal. This officer was first appointed in 1788, before Upper Canada was set apart, to act in conjunction with the courts of quarter sessions then erected in the "new districts" (29 Geo. III. ch. 3., sec. 7 (1789), (Quebec Act)). He is spoken of as an existing

officer in 1806, when the name is first mentioned in Upper Canada legislation, and he is there recognized as a corporation sole,—bonds for security to be taken to him and his successors: 46 Geo. III., ch. 9, secs. 3, 4, 7 and 8.

I may further note that the provision from Consol. Stat. U.C. ch. 110, as to the copy of indictment furnished to the defendant not being "receivable in evidence upon any trial for malicious prosecution," which was quoted with emphasis by the Court in *Regina v. Ivy*, was repealed by 32 & 33 Vict., ch. 36, p. 412 (D.); and it was also in the same session re-enacted as to the defendant being entitled to a copy of the indictment *simpliciter*: *ib.* ch. 29, sec. 47; a provision now appearing in the Criminal Code: sec. 654.

I see no escape from the conclusion that the judgment should be reversed, and that the writ asked for should be issued to the clerk of the peace.

FERGUSON, J.:—I agree in the conclusion arrived at in the Chancellor's judgment.

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THE GRAND HOTEL COMPANY OF CALEDONIA SPRINGS, LIMITED

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THE SAME COMPANY v. TUNE.

Trade Name—Infringement of — “Caledonia Water,” “Caledonia Mineral Water.”

The plaintiffs had been for many years the owners of certain springs and had procured a trade mark to be registered of the water therefrom under certain devices and the names “Caledonia Water” and “Caledonia Mineral Water.” This water, through the plaintiffs’ exertions and the expenditure of large sums of money, had become widely known, and was used medicinally and as a beverage. The name “Caledonia” was the name of the township in which the springs were situated, but this had been lost sight of in the name given to the plaintiffs’ place, “Caledonia Springs,” where they had erected a hotel around which a village of that name had sprung up, and a railway station of the same name had been placed. The defendants purchased a lot about a quarter of a mile from the plaintiffs’ place, where they sank an artesian well from which they procured a water which they sold under the name of “Caledonia Water” and “Water from the New Springs at Caledonia,” imitating the shape and make of the plaintiffs’ goods, the object admittedly being to sell their water in the market established by the plaintiffs:—

Held, that the defendants’ acts were calculated to mislead, and did mislead, purchasers, and an injunction was granted restraining the defendants from selling the water under the names adopted by them.

THESE were actions for an alleged infringement of the plaintiffs’ trade-names, and for an injunction restraining the defendants from selling the mineral water under said names.

The actions were tried together before BOYD, C., at Ottawa, on June 7th, 1901.

Walter Cassels, K.C., and F. Arnoldi, K.C., for the plaintiffs.

G. F. Shepley, K.C., and W. E. Middleton, for the defendants.

The plaintiffs were a company incorporated under the laws of this Province for the purpose of hotel-keeping and the selling of mineral waters in connection with certain springs called the “Caledonia Springs,” situated on lot 20 in the 1st concession of the township of Caledonia, in the county of Prescott, containing 200 acres, of which they were the owners. They were also the lessees of another spring known as the “Intermittent Springs,” situated on an adjoining lot.

The plaintiffs claimed as owners of five registered trade-marks, employing, among others, the names "Caledonia Water," "Caledonia Seltzer," and "Caledonia Mineral Water"; and also as entitled to the exclusive use of the word "Caledonia," by reason of its original application and continuous use since early in the last century, to designate the waters derived from "The Caledonia Springs" owned by them and their predecessors in title in the township, and that such word had acquired a secondary meaning as applied and used in describing the said waters. Many years ago the owners procured a post-office to be opened in their hotel, of which the postmaster had always been an official of theirs, or of their predecessors. Various buildings had been put up from time to time for the convenience and entertainment of people visiting the springs for the waters, but there never was any village there; the Canadian Pacific Railway had lately erected a station there, having been granted by plaintiffs a right of way through lot 20, which, like the post-office, the plaintiffs had procured to be called "Caledonia Springs," because of their proximity, and for the purpose of advertising them. The plaintiffs had spent upwards of \$30,000 in advertising and establishing a business in the sale of the waters under titles, using the word "Caledonia" as distinctive.

In 1898 the defendants purchased a lot about half a mile from the said springs, on which they sank an artesian well, there being no natural spring on it, from which well they procured a saline water which they sold under the name of "Caledonia Water," and "Water from the New Springs at Caledonia," it being admitted that their object was to sell the water as Caledonia Water in the established market, imitating the make and shape of the plaintiff's goods but not actually infringing their trade-mark.

The learned Judge, at the close of the evidence, reserved his decision, and subsequently delivered the following judgment.

July 18. BOYD, C. :—From the evidence I think the proper conclusion is that the words "Caledonia Water" and "Water from Caledonia Springs" mean the mineral waters supplied by the plaintiffs, which has been for many years on the market and

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widely used medicinally and as a beverage. The use by the defendants of the words "Caledonia Water" and "Water from Caledonia Springs," is calculated to mislead, and has been used so as to mislead purchasers.

One of the defendants, Lyall, admits that his object in calling his production "Caledonia Water" was "to sell as Caledonia Water in the established market," i.e., to avail himself of the benefits of the large expenditure (\$30,000) for advertising on the part of the plaintiffs, which has familiarized the public with this particular water from the Caledonia Springs owned by the plaintiffs and their predecessors.

The contention of the defendants is, in effect, that the description adopted by the plaintiffs is ambiguous, or open to the disadvantage of duplicity, that is, it fits the plaintiffs' product and defendants' product, because both are water of saline character, drawn from the township of Caledonia; but the observations made by Lord Macnaghten in *Reddaway v. Banham*, [1896] A.C. 199. pp. 218, 219, shew the fallacy and inefficiency of this method of defence.

The evidence generally shews an intention on the part of the defendants to imitate the shape and make-up of the plaintiffs' goods, and yet to sail so close to the wind that their label is no legal infraction. With the exception of the temporary invasion of the trade-mark by Tune's use of the first label, they have not actually infringed the plaintiffs' registered trade-mark; but as to the trade-names first mentioned by me, I think the case of the plaintiffs is established.

No doubt the township name may have originally, early in the last century, suggested the application of it to the water; but in course of time the township name has been lost sight of in the particular name "Caledonia Springs," localized through the agency of the plaintiffs. At this point where the three springs are situated there grew up in course of time the Caledonia Springs village (attached to the hotel), the Caledonia Springs post-office, and the Caledonia Springs station. A letter merely addressed to "Caledonia" would go to that place in the township of Haldimand. This distinctive character now and for a long time past generally attributed to the "Caledonia Springs," arose from the exertions and expenditure of the

plaintiffs in making known the qualities and worth of the water arising from their springs. The wide spread market for this water known by this name was made entirely by the enterprise of the plaintiffs.

Knowing this the defendants have sought to profit by it, and not perhaps by means of perfectly accurate representations. The defendants call their product "Water from the New Springs at Caledonia," and their labels carry prominently the words "Springs" and "Caledonia." Now, it is not correct to speak of the water vended by them as "New Springs." Their water was reached by means of boring and drilling, and it rises as from an artesian well. The plaintiffs' water issues naturally from the earth, and is and has long been the spontaneous outflow of mineral springs. Neither are the so-called "New Springs" of the defendants at Caledonia. They may be in Caledonia, *i.e.*, the township of that name, but the desire was to localize the new venture so that it might be confounded with the better and well-known product.

Proof was given in this case of that which was held an actionable wrong by James, L.J., in *Singer Manufacturing Co. v. Loog* (1880), 18 Ch. D. 395, at p. 412 (cited in *Reddaway v. Banham*): "No man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a distinct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie, or to make a false representation to somebody else who is the ultimate customer."

Many cases were cited, but it is not necessary to dwell on the authorities at greater length. I had occasion to consider the law pretty fully in *Robinson v. Bogle* (1889), 18 O.R. 387; *Rose v. McLean Publishing Co.* (1897), 27 O.R. 330, and 24 A.R. 240.

Judgment should be entered for the plaintiffs with costs.

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[DIVISIONAL COURT.]

TRUNKFIELD V. PROCTOR.

Bills of Exchange—Equitable Assignment—Trust—Private Banker—Bills of Exchange Act, 53 Vict. ch. 33, secs. 72 (2), 74 (D.).

The owner of certain lands, subject to a mortgage made by him, conveyed the property on certain conditions, among which were that the grantee should pay him an annuity, and pay a certain proportion of the mortgage, the mortgagor remaining liable for the balance. Subsequently, and in order to pay his share of the mortgage money, the mortgagor signed an order on a private banker with whom he had a deposit account, payable to the mortgagee or bearer, which he then delivered to the banker, who, although he informed the mortgagee that he had the money of the mortgagor to pay him, did not tell him of the existence of the order. On being shewn the order and informed of what the mortgagee had done, the grantee paid the amount of the annuity then due. Afterwards, and before the money was paid over by the banker to the mortgagee, the mortgagor died.

Held, by FALCONBRIDGE, C.J.Q.B., that under sec. 72, sub-sec. 2 and sec. 74 of the Bills of Exchange Act, 53 Vict. ch. 33 (D.), the document being drawn on a private banker, was not a cheque but a bill of exchange, and that it was not revoked by the drawer's death.

On appeal to a Divisional Court, the judgment was affirmed on the ground that the transaction amounted either to an equitable assignment of the amount or a trust to pay over the same to the mortgagee, which became irrevocable on its being communicated to the parties and assented to by them.

THIS was an interpleader issue tried before FALCONBRIDGE, C.J.Q.B., at Barrie at the Autumn assizes of 1900.

W. A. Boys, for the plaintiff.

T. Ernest E. Godson, for the defendants.

January 18. FALCONBRIDGE, C.J.:—This is an interpleader issue, the plaintiff, Charlotte Trunkfield, claiming, as executrix of the late Neil McEachren, to be entitled to the sum of \$560, less \$20 costs, paid into Court pursuant to order of the Master in Chambers, dated 21st September, 1900; the defendants Proctor and McKay claiming that they are, or one of them is, entitled to the said sum.

The facts are as follows:

By indenture of mortgage, bearing date 27th of November, 1894, the said Neil McEachren mortgaged part of broken lot 16, in concession C of the township of Mara, in the county of Ontario, to the defendant Proctor to secure the sum of \$2,400, with interest at 6 per cent., the principal money payable in five

years from the date of the mortgage, with interest to be computed from the 1st of March, 1895, payable yearly.

By indenture bearing date 7th of June, 1897, expressed to be made in pursuance of the Act respecting short forms of conveyances between the said Neil McEachren, of the first part, the defendant Donald McKay, of the second part, and one Benjamin Madill, of Beaverton, banker, of the third part, after reciting that McEachren is the owner in fee simple of the above-mentioned lands and premises, subject to the above-mentioned mortgage, "upon which there is due and owing the principal sum of \$2,000 and interest from the 1st day of March, 1897," and that McKay has been residing with McEachren on the property, working the same for and on behalf of McEachren, and that McEachren is desirous of granting to McKay, his heirs and assigns, the said lands, subject to a life interest therein to McEachren together with McKay, it being the intention of the parties that the property should vest absolutely in McKay immediately on the execution of these presents, subject to McEachren's life interest; and, after reciting an agreement between the parties that, in consideration of the conveyance, etc., McKay should assume and pay the sum of \$1,500 of the principal money secured by the mortgage and the interest thereon, and McEachren should only remain liable for the balance or sum of \$500 and interest thereon, McEachren did grant to Madill the said land; *habendum* to Madill, to the use of McKay subject to McEachren's life interest.

By agreement under seal, bearing date 7th June, 1897, made between the said Neil McEachren and the defendant Donald McKay, after reciting that McEachren was the owner in fee of the said parcel of land, and the making of the said mortgage whereon "there is now due and owing the principal sum of \$2,000 and interest thereon from 1st March, A.D. 1897," and after reciting that McKay is the nephew of McEachren and has been residing with him, working the said lands for and on behalf of the said McEachren, and after reciting the above conveyance and an agreement between the parties for the support of McEachren, it was witnessed that McKay covenanted to assume and pay off \$1,500 of the principal sum secured by the mortgage, and interest thereon, and McEachren covenanted to

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pay the balance or sum of \$500 on the said mortgage and interest thereon.

The deceased, Neil McEachren, had a deposit account in the savings department of the private bank of B. Madill & Co., of Beaverton. On the 1st January, 1900, there was at his credit, as appears by the pass book, the sum of \$639.

McEachren is described by Mr. Madill as having been rather an illiterate man, who could barely write his own name.

On the 4th January, 1900, McEachren, who was going to a hospital in Toronto for treatment, saw Mr. Madill and asked him to settle the \$500 due on the mortgage to Proctor. Madill had been notified by McEachren to collect \$150 annuity from McKay, which McKay had been keeping back until McEachren should pay his share of the mortgage money or interest thereon. McEachren said to Madill, "You make McKay pay in the annuity and I will attend to my part of the Proctor mortgage myself." Madill said it would be better to make it \$560 to settle the whole mortgage matter, and Madill accordingly drew out the following paper which, he says, McEachren signed by his mark :

"No. 43.

Beaverton, Ont. Jan. 4th, 1900.

B. MADILL & Co., Bankers.

Pay to G. R. Proctor (on mortgage, McEachren's share), or bearer, Five Hundred and Sixty Dollars.

Witness,

(Sd.) B. Madill.

\$560.00. (Sd.) Neil (his x mark) McEachren."

Stamped as follows: "B. Madill & Co.—Paid—Bankers, Beaverton, Ont."

The "paid" stamp, Madill says, was stamped on the 1st of February, 1900, and at the same time an entry thereof was made in the ledger.

A day or two after the signing of this paper, Proctor was in Madill's office, and Madill told him McEachren had left \$560 with him, Madill, to pay on this mortgage. Proctor said he did not want the money till the first of the month. Madill swore that if Proctor had wanted it he, Madill, would have paid Proctor then. Madill did not then tell Proctor he had a cheque for him. He did not shew it to him, nor did he ever deliver it to him. It never passed out of Madill's hands.

On the 18th January, 1900, McEachren died in the Toronto General Hospital, having previously made his will, dated the 3rd April, 1899, whereby he gave, devised and bequeathed all his real and personal estate to the plaintiff, and appointed his brother Henry and the plaintiff to be his executors; probate of which will was issued to the plaintiff out of the proper surrogate court on the 1st February.

On the 29th January Madill paid over the money to Proctor, and took from him the following receipt, dated 31st January, 1900 :

"\$560.00.

Jan. 31st, 1900.

Received from B. Madill & Co., Five Hundred and Sixty Dollars on Donald McKay and Neil McEachren mortgage, being amount payable by Neil McEachren on the same. (Sd.) G. R. Proctor."

Madill says further that he saw McKay a few days prior to the death of McEachren, and told him, McKay, that McEachren had paid him, Madill, \$560 to hand to Proctor, and that there was no question now as to the interest, and McKay paid to Madill the \$75 instalment of annuity which appears credited in the pass book under date of March 1st.

Madill swore that he shewed McKay the signature of McEachren to the paper; but afterwards corrected himself, and said he was wrong in saying that he shewed McEachren's signature to McKay.

There had been interviews between the plaintiff, the executrix, and Madill on the 19th January, and following days. As to what passed there is some conflict of testimony between them. He says that he told her on the first interview that \$560 had to be taken from the amount which appeared to be at McEachren's credit in the pass book. She says he told her about the 20th March that he had paid Proctor. Madill says he thought he was responsible to Proctor as he had told him he had the money for him.

While the matter would be presumed to be fresh in his mind, namely, on the 27th April, 1900, Mr. Madill wrote a letter to Messrs. McCarthy, Pepler & McCarthy, who were representing the plaintiff, in which he made some statements which were not exactly in accord with his testimony in the witness box.

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In this letter he says, "I explained this to Neil. He said he would pay Proctor and wanted McKay to pay me for him. He then gave me the cheque for \$560 to be used 1st February. I asked him to do this," etc. Madill says in the box, he has looked up the cheque since and been thinking the matter over, "It is not a cheque; it is a memorandum. I made it as a memorandum; in form it is a cheque. McEachren did not name any date. I thought the mortgage was due on 1st February. I am wrong in saying in the letter he thought it was the 1st of February. I mentioned that date to him." Madill had full knowledge of the death before paying over the money to Proctor. He had drawn the will, and knew the plaintiff was executrix.

A memorandum of account was put in shewing claims against the estate to the amount of \$138.32. Besides this it is said that claims to the amount of about \$30 more have been put in; and the plaintiff herself says that she herself has put in a claim for \$300 for maintaining the deceased.

After a contest arose about the matter, Proctor paid back the money to Madill under protest in a writing which was not produced. Madill got leave to pay the money into Court, less \$20 costs; and the learned Master directed this issue to be tried, wherein the executrix is plaintiff and Proctor and McKay are defendants, the plaintiff claiming, as executrix of Neil McEachren, that the money should be paid over to her for distribution among the creditors of the said Neil McEachren, and the defendants claiming that they are, or one of them is, entitled to the said money on the ground that it was paid to B. Madill & Co. by Neil McEachren, deceased, to be paid over to the defendant George Proctor to be applied by him in discharge of the mortgage indebtedness of the said Neil McEachren to said Proctor and assumed by said McEachren under the agreement of 7th June, 1897.

If the instrument of January 4th, 1900, were a cheque the matter would be easily disposed of, for, by sec. 74 of the Bills of Exchange Act, 53 Vict., ch. 33 (D.), the duty and authority of the bank to pay it would have been terminated by notice of the customer's death.

But "bank" under the Act means an incorporated bank or savings bank (sec. 2 (c)); and a cheque drawn on a private banker is not a cheque within the meaning of the Act.

Dr. Maclaren says (p. 380 of 2nd edition of his work), "It would be simply a bill of exchange, payable on demand, and subject to such provisions of the Act as apply to an instrument of that kind."

By sec. 3 of the Act: "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer."

By sec. 72, sub-sec. 2: "Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."

Dr. Maclaren's note to this is: "The exceptions are . . .
2. That the bank should not pay after notice of the customer's death": sec. 74.

By sec. 2 (a): "The expression 'acceptance' means an acceptance completed by delivery or notification."

By sec. 17: "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer."

Sub-sec. 2: "An acceptance is invalid unless it complies with the following conditions, namely: (a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient."

By sec. 21: "Every contract on a bill, whether it is the drawer's, the acceptor's, or an endorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto."

Sub-sec. 2: "As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery (a) in order to be effectual, must be made either by or under the authority of the party drawing, accepting, or endorsing, as the case may be. . . ."

Sub-sec. 3: "Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor or endorser,

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a valid and unconditional delivery by him is presumed until the contrary is proved."

By sec. 2, sub-sec. (f): "The expression 'delivery' means transfer of possession, actual or constructive, from one person to another."

By sec. 53: "A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument."

Whether the authority or obligation to accept is or is not revoked by the death of the drawer, does not appear to be well settled in England.

Chalmers' Bills of Exchange, 5th ed., p. 182, says: "Apart from something special in the contract, it seems that it is not revoked," citing Story on Promissory Notes, 7th ed., sec. 250; *Cutts v. Perkins* (1815), 12 Mass. 206; *Billing v. Devaux* (1841), 3 M. & G. 565 at p. 574; *Attorney General v. Pratt* (1874), L.R. 9 Ex. 140. See note (1) p. 202 of Chitty on Bills of Exchange, 11th ed., where the author, citing the Massachusetts case, says "the point does not appear to be settled in this country," and goes on to say: "If the drawing of a bill is to be considered as a bare authority that is revocable, then the death of the drawer would determine the authority of the drawee to accept or pay; but if it is an authority coupled with an interest in favour of a payee or indorsee, then death would be no countermand."

Accepting this view of the law, there was authority to Madill to accept and pay notwithstanding the death of the drawer. There was sufficient delivery of the instrument to give effect thereto by the transfer of actual possession to Madill, who held it thereafter as agent for Proctor, and, if anything further was necessary to complete the delivery, it was completed by Madill telling Proctor a day or two after that McEachren had left \$560 with him to pay on the mortgage.

There will be judgment for the defendants in the issue with costs.

The effect of this judgment will be to carry out the expressed wish of the plaintiff's testator.

If this situation had been acquiesced in promptly by the executrix there would have been surplus enough in the estate to pay the debts, excluding the recently advanced claim of the plaintiff.

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From this judgment the plaintiff appealed to a Divisional Court.

On March 12th, 1901, before a Divisional Court composed of MEREDITH, C.J.C.P., and MACMAHON, J., the appeal was argued.

Boys, for the appellant. The learned Chief Justice has found that the document in question was a bill of exchange, and that by sec. 72, sub-sec. 2, and sec. 74, the revocation in case of the death of the drawer was limited to a cheque. A bill of exchange, however, would be revoked under the circumstances appearing here. At the time of the drawer's death the instrument had not been completed as a bill of exchange. It was never delivered to the payee, but remained in the hands of the banker, as agent of the drawer and not of the payee. The relationship between customer and banker is that of principal and agent, and the death of the principal revokes the authority of the agent; so that on McEachren's death Madill's authority was revoked, and the bill ceased to have any effect, and was likewise revoked: *Jacques v. Worthington* (1859), 7 Gr. 192; *Watson v. Maxwell* (1815), 4 Camp. 272; Chalmers on Bills of Exchange, 5th ed., 182. The transaction cannot be supported as an equitable assignment. The defendant Proctor, to whom the money was to be paid, was no party to the transaction, and did not assent to it.

T. Ernest Godson, for the respondents. The sections of the Act referred to shew that it is only in case of a cheque that the death of the drawer revokes payment. The cases referred to by the learned Chief Justice shew that a bill would not be revoked. There was, however, a valid equitable assignment. McKay was informed by Madill of the direction to pay, and the bill was shewn to him; and Proctor was also told by Madill that he had the money for him and he was prepared to pay it. Madill would then hold the money for Proctor and not for

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McEachren : Am. & Eng. Encyl. of Law, 2nd ed., vol. 4, p. 209; *Goodwin v. Bowden* (1866), 54 Me. 424; *Creager v. Link* (1854), 7 Md. 259; Taylor's Eq. Jur. 876.

July 19. MEREDITH, C.J.:—I am of opinion that the judgment appealed from is right; but I hesitate to rest my judgment on the ground on which the learned Chief Justice proceeded.

I agree that the instrument of the 4th January, 1900, is a bill of exchange; but I find difficulty in coming to the conclusion that it was delivered to Madill & Co. for the respondents, or either of them, or was ever held by Madill & Co. as the agents of the respondents, or either of them. Madill & Co. were the agents of McEachren, the drawer, and their possession of the bill was, I am inclined to think, in that capacity and no other.

The proper conclusion from the evidence is, I think, that there was a direction by McEachren to Madill & Co. that the latter should pay to the respondent Proctor the \$560 in question out of the moneys in the hands of Madill & Co. standing at the credit of McEachren.

Both of the respondents were interested in the payment of the \$560 by McEachren—the respondent Proctor as the person who was to receive the money, and the respondent McKay as the person directly liable for its payment to Proctor and entitled, according to his agreement with McEachren, to have the liability discharged by the latter.

There was, therefore, in my opinion, either a valid equitable assignment of the fund in Madill & Co.'s hands to the extent of the \$560, or a trust in respect of the fund for the payment of that sum to the respondent Proctor in discharge of that part of the indebtedness of the respondent McKay to him which McEachren had undertaken to pay.

That equitable assignment or trust became irrevocable when it was communicated to the parties for whose benefit it was created, or, at all events, when assented to by them. There would perhaps be some difficulty in holding that there was such a communication to, or assent by, the respondent Proctor, for he was never informed of anything but the fact that McEachren had left the money with his agents, Madill & Co., to pay the

respondent Proctor when the money payable to him should become due, but the respondent McKay was shewn the bill of exchange and informed of the direction which McEachren had given for the payment of the \$560, and assented to and acted upon it by paying the annuity which he was to pay to McEachren, payment of which he had withheld until McEachren should have paid the interest on the amount which he had undertaken to pay to the respondent Proctor.

In other respects I agree with the judgment appealed from, and would dismiss the appeal with costs.

MACMAHON, J. :—I agree.

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THE CANADA ATLANTIC RAILWAY COMPANY.

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THE CORPORATION OF THE CITY OF OTTAWA.

THE MONTREAL AND OTTAWA RAILWAY COMPANY.

V.

THE SAME CORPORATION.

Railways—Right to Cross Streets—Expropriation Proceedings or Compensation—Necessity for—Extension of City Limits—51 Vict. ch. 53, sec. 9 (O.)—Toll Road, Purchase of—Effect of.

Railways incorporated by the Dominion Parliament, where in the construction of their lines of railways, they have complied with the requirements of the Dominion Railway Act and obtained the consent of the railway committee, have the right to cross the highways of a city without taking expropriation proceedings under the Railway Act, or without making any compensation to the city therefor.

Where under the powers conferred by 51 Vict. ch. 53, sec. 9 (O.) for extending the limits of the city of Ottawa, the city acquired at an agreed price, part of the road of a toll road company within such extended limits, such part thereupon ceased to have its previous character of a toll road, and became a highway like the other public streets of the city.

THESE were actions brought against the corporation of the city of Ottawa claiming injunctions to restrain interference with the construction and operation of the portions of the plaintiffs' railways which crossed respectively Bridge Street and Wellington Street in the city. •

The facts, so far as material, were as follows:—

As to the plaintiffs, the Canada Atlantic Railway Company.

Under 34 Vict. ch. 47 (D.) and 35 Vict. ch. 83 (D.), the Montreal and City of Ottawa Junction Railway Company and the Coteau and Province Line Railway and Bridge Company were respectively incorporated; and by 42 Vict. ch. 57 (D.), • 1879, these two companies were amalgamated under the name of the Canada Atlantic Railway Company, and empowered to lay out, construct and finish a double and single line of railway from a point near Coteau Landing to the city of Ottawa.

On 5th September, 1885, the Canada Atlantic Railway Company deposited in the Department of Railways and Canals a plan and book of reference of a portion of the line within the

city of Ottawa, including the crossing of Bridge Street, which on the 7th September, 1885, were certified by the deputy minister of railways and canals, and duplicates filed in the office of the clerk of the peace for the county of Carleton, and the railway was then constructed and operated to Bridge Street, the power to cross Bridge Street not being then exercised.

Under 62 & 63 Vict. ch. 8, (D.), the company was amalgamated with the Ottawa, Arnprior and Parry Sound Railway Company, under the name of the Canada Atlantic Railway Company, the time being extended for the completion of the railway authorized by 42 Vict. ch. 57 (D.) until 11th August, 1904.

On May 9th, 1900, the plaintiffs deposited in the said department an amended or revised plan of the construction of the said line across Bridge Street, which on May 31st, 1900, was certified by the said deputy minister, and a duplicate filed in the registry office for the city of Ottawa. A book of reference was also deposited in the said department, which on 31st May was certified by the said deputy minister, and a duplicate thereof registered in the registry office for the city of Ottawa.

On 16th June, 1900, the company deposited in the said department a plan and profile of the line of railway crossing Bridge Street, and made application to and obtained two orders from the Privy Council, dated respectively the 15th October and 9th November, 1900, approving of the construction of the railway across the said street.

On 5th December, 1900, on the company attempting to construct their railway across the said street, they were obstructed and prevented by the defendants from so doing, whereupon this action was brought claiming an injunction.

The defence set up by the defendants was that Bridge Street was a public highway, and that the railway company had no right to cross it unless they had a right of way over it by prescription, or by conveyance from the defendants, or had procured such right by arbitration proceedings under the Railway Act.

They also set up that leave had been given the company to cross such street by a resolution of the council dated 1st October, 1900, for the purpose of enabling one J. R. Booth to

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get to his lumber yard, but that such leave was conditional on the railway being removed therefrom on notice therefor being given by the corporation, and that such notice had been given; and in any event, this portion of the railway was not part of the defendants' main line, but merely a spur to reach such lumber yard.

They also set up that the orders of the Privy Council had been obtained *ex parte* and were not binding on the corporation.

As to the plaintiffs, the Montreal and Ottawa Railway Company.

By 47 Vict. ch. 84 (D.), the Vaudreuil and Prescott Railway Company was incorporated, with power to lay out, construct and finish a railway from, at or near Vaudreuil to the city of Ottawa.

By 53 Vict. ch. 58 (D.), the name of the railway was changed to that of the plaintiffs, the Montreal and Ottawa Railway Company; and by the Acts 54 & 55 Vict. ch. 96 (D.), 57 & 58 Vict. ch. 85 (D.), 59 Vict. ch. 25 (D.), and 64 Vict. ch. 66 (D.), the time for the completion of the railway was from time to time extended; the time allowed by the last-named Act being until the 7th May, 1905.

The plaintiffs from time to time deposited in the said department, plans, profiles and books of reference of the several sections; those referring to the section within the city of Ottawa, including the crossing of Wellington Street, being on the 19th February, 1900, examined and certified by the said deputy minister, and on 19th April, 1900, duplicates were deposited in the registry office for the city of Ottawa.

On 19th January, 1901, the company made application to, and on the 7th March, 1901, obtained an order of the Privy Council approving of the construction of the said railway across the said street.

The plaintiffs thereupon commenced the construction of the line across the said street, whereupon they were obstructed and prevented by the defendants from so doing, and this action was then brought claiming an injunction.

The defendants set up that the plaintiffs had completed their line of railway to the city of Ottawa, as authorized by

the Acts relating thereto, and that the line in question formed no part of such line as authorized.

They also set up that Wellington Street had been constructed by the Bytown and Nepean Road Company under the provisions of the General Road Companies' Act, the fee of the said road being in the company, subject to an easement in the public of travelling over the same; and by 51 Vict. ch. 53 (O.), 1888, the city were empowered to extend the limits thereof and re-arrange the wards, sec. 9 empowering the city to acquire so much of the said road as was embraced in the extended limits; the amount to be paid therefor, if not agreed on, to be settled by arbitration under the Municipal Act, and that they had duly purchased and paid for such portion, and that they were therefore the owners of the freehold therein.

They further set up that the order of the Privy Council did not purport to grant to or confer on the plaintiffs any right of way over the said street, but merely approved of the plaintiffs' plan and profile, and purported to provide protection to the public using said street, and the company thereby did not acquire any right to construct said railway over said street; and in any event, if the order purported to grant such right, it was *ultra vires*.

The defendants also counterclaimed, repeating the allegations in the statement of defence, and setting up that the plaintiffs had constructed and were operating said portion of the road without any authority, and had refused to remove the said railway from the said street, or to discontinue operating the same, and that as the same constituted an obstruction and impediment to travel and a source of danger to the public, the defendants had removed the said railway from the said street, and that the plaintiffs threatened and were endeavouring to reconstruct this portion of the said railway; and they asked for injunction to restrain them from so doing.

Both actions were tried before BOYD, C., at Ottawa, on June 10th, 1901.

Wallace Nesbitt, K.C., and C. J. R. Bethune, for the plaintiffs, the Canada Atlantic Railway Company.

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Aylesworth, K.C., and *Taylor McVeity*, for the defendants in the first action.

Wallace Nesbitt, K.C., and *D'Arcy Scott*, for the plaintiffs, the Montreal and Ottawa Railway Company.

Aylesworth, K.C., and *Taylor McVeity*, for the defendants in the other action.

The learned Chancellor at the conclusion of the evidence reserved his decision, and subsequently delivered the following judgment.

June 18. BOYD, C.:—The broad question presented in both cases is whether the railroads authorized by Dominion statutes have the right to cross highways in the city of Ottawa without expropriation or without making compensation.

The proper conclusion is, in my opinion, in the affirmative, having regard to the provisions of the Dominion General Railway Act, 51 Vict. ch. 29 (D.).

This Act defines "highway" as including "any public road, street, lane or other public way or communication:" sec. 2 (g).

To the railway company is given the general power to make or construct in, upon or across any highway which it intersects, permanent roads, ways and passages: sec. 90 (g).

By sec. 183 "the railway shall not be carried along an existing highway, but shall merely cross the same, . . . unless leave therefor has been obtained from the Railway Committee;" and by sec. 187 it is further provided that in the case of level crossings (and such are those now in question) the company, before constructing or using the same, shall submit plans and profiles of that part of the railroad to the Railway Committee for approval.

The jurisdiction and powers of the Railway Committee are conferred and defined by sec. 11 of the Act. The committee has power "to inquire into, hear and determine any application, complaint or dispute respecting (*h*) the construction of railways . . . across highways."

The decision of this tribunal is, if not afterwards reversed, rescinded or varied by itself, declared to be final: secs. 17, 18 and 21; and enforceable in like manner as a judgment of the Exchequer Court of Canada.

As I read this legislation, there is statutory power given to the railway to cross any highway on its line of route, in due course, subject to the approval of the committee before constructing or using the crossing.

All these preliminaries have been observed in these cases as to route, plans, profile and approval; and it follows that this Court has no power or jurisdiction to add another term to the statute as to compensation or expropriation.

It is pointed out in various cases referred to that the provisions as to the taking of lands are not pertinent to the case of highways which are for the purposes of public travel. The crossing by the track does not, in law, affect their character or use as highways, and is regarded as an additional public convenience: *Sidney v. Young*, [1898] A.C. 457.

As to the crossing of Wellington Street by the Montreal and Ottawa Railway, it is urged that at the particular place of intersection the road is not a public highway, but is one which is owned in fee by the city. This contention is based on the Ontario statute providing for the extension of the city: 51 Vict. ch. 53, sec. 9. Parts of the roads of certain road companies were included in the new territory to be annexed, and the statute imposed on the city the duty of acquiring so much of the roads as would be embraced within the limits of the city as so enlarged. The city is to pay the companies for the parts in the city, and in case of non-agreement, the amount to be settled by arbitration pursuant to the provisions of the Municipal Act.

The point is not without difficulty, and yet it will not represent much in the way of value, even supposing the plaintiff is right, for the taking by the company will only be to the extent that public highways are taken by the crossing of the track. This crossing of Wellington Street will not interfere with the public user, and will not amount to a taking of the fee in the soil as in the case of private ownership.

But I think the better construction is to hold that the legislation making these roads parts of the streets of Ottawa (though for a consideration) destroyed their character as roads from which tolls might be levied, and did, in effect, make them like the other public streets of the city. The transaction was

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not a purchase under the provisions of the General Road Companies' Act, R.S.O. 1897 ch. 193.

The reference to the method of fixing compensation under the Municipal Act imports that the ways when acquired are so "by exercise of the powers" of the corporation under the special Act, and shall become ordinary municipal property forming part of the public streets of Ottawa: Municipal Act, sec. 437.

The safeguards to be adopted for the protection of the public, and the adjustments required to maintain the highway in an efficient state at and near the point of intersection, are matters to be investigated and ordered by the Railway Committee upon proper supplementary application, if they have not already been sufficiently considered and adjudicated upon; but, having regard to the scope of the Railway Act, they do not appear to fall within the reach of this Court by injunction or otherwise at the present stage of construction.

This function of the Railway Committee is perhaps emphasized when resort is had to the Provincial Legislation as to railways.

By R.S.O. 1897 ch. 207, sec. 29, sub-sec. 1, it is enacted that "the railway shall not be carried along an existing highway, but merely cross the same in the line* of the railway, unless leave has been obtained from the proper municipal authority therefor." In a provincial road the public are protected by the intervention of the municipal authorities; in a Dominion road the like obligation is cast upon the Railway Committee.

The plaintiffs, therefore, should obtain or retain the injunction sought against the city's interference, with costs; and the counterclaim of the defendants should be dismissed with costs.

G. F. H.

[IN CHAMBERS.]

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July 18.

Executors and Administrators—Goods Exempt from Execution—Right of Widow to—Effect of Provision for Wife in Will—Devolution of Estates Act—Gift of Property belonging to Wife—Election—Insurance Moneys—Charge on—Payment by Devisees pro rata.

Goods of a deceased husband exempt from seizure under the Execution Act, R.S.O. 1897 ch. 77, are not, except as to funeral and testamentary expenses, assets in the hands of his executors for the payment of debts, the effect of sec. 4 of that Act being to give his wife a parliamentary title thereto.

The fact of the wife being residuary devisee, under the husband's will, does not put her to her election as to taking such goods either under her statutory title or under the gift of the residue, unless the testator clearly assumes to deal with them as part of the residue, and the fact that under the terms of the will the provision made for her should be in lieu of dower does not create a presumption that he is dealing with the goods.

Section 4 of the Devolution of Estates Act, R.S.O. 1897 ch. 127, which makes all the personal property of a testator in the hands of his personal representatives subject to the payment of his debts, must be read as being subject to sec. 4 of the Execution Act.

A piano belonging to the wife, who was the residuary devisee of the real and personal estate, was dealt with by the husband under his will, as part of his estate, by giving it to his son :—

Held, that the wife must elect either to allow the son to retain it, or to take it herself, making good to the son the value thereof out of the provision made for her in the will.

A policy of insurance was by the husband's will made payable to and for the benefit of his wife and son, and he thereby apportioned the proceeds between them. The policy was charged with the payment of a loan procured by the testator from the company :—

Held, that the amount of the loan was payable by the wife and son *pro rata* out of their respective shares of such moneys, the gifts to them being specific.

THIS was an originating notice under Con. Rule 938 by the executors under the will of Herbert Tatham, deceased, for the purpose of determining certain questions arising in the the administration of his estate, which was heard before MEREDITH, C.J.C.P., in Chambers, at London on the 26th April, 1901.

The deceased died on the 25th of October, 1900. His will, dated 1st June, 1900, was, so far as material, as follows :

" 1. I hereby revoke all former wills and testaments and testamentary dispositions by me at any time heretofore made.

" 2. I direct my executors hereinafter named to pay all my just debts and funeral and testamentary expenses as soon as convenient after my decease.

" 3. I give and bequeath to my son Charles Heathcote Tatham the sum of five hundred dollars, and the following

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articles out of my personal estate and effects," namely: a number of pictures and photographs [setting them out] his writing-desk and contents; piano, with cover and stool; and his gold watch and jewelry.

"4. I give and devise to my son, the said Charles Heathcote Tatham, lot numbered seven in block "A" according to plan 376, in the said city of London, upon which said land is erected the building known as street number 91 Warnecliffe Road in the said city of London.

"5. My policy of insurance, issued by The London Life Insurance Company, and numbered 5042, I hereby declare to be payable to and for the benefit of my wife and my son Charles Heathcote Tatham; and I hereby apportion the proceeds thereof as follows, namely, to my son Charles Heathcote Tatham the sum of five hundred dollars (being the five hundred dollars mentioned in the third clause hereof), and to my wife the residue thereof.

"6. And all the rest and residue of my estate real and personal I give, devise and bequeath to my wife.

"7. And I direct and declare that the gifts, bequests, and devises to my wife, set out in the fifth and sixth clauses hereof, are to be accepted by her in lieu of any dower out of or any distributive share of my estate."

And he appointed John George Richter and his son, C. H. Tatham, his executors.

There was also a codicil, dated 21st June, 1900, under which the testator gave a sleigh, harness, robes, and a number of household articles to his son, C. H. Tatham; and in other respects he confirmed his will.

The testator's estate consisted of the following: the said lot seven, valued at \$1000, free from incumbrance; certain household goods and furniture and other chattel property and effects, valued at \$285 (this was exclusive of the piano, which was claimed by the widow as her own property); \$58.48 deposited in the Savings Bank; a paid up policy in the London Life Insurance Company for \$36.50; the policy in the same company for \$2000, referred to in the fifth paragraph of the will, which was subject to a lien thereon for \$300, money borrowed by the testator, and expressly made chargeable on the insurance

moneys. The value of the goods specifically bequeathed to the said son, C. H. Tatham, with the exception of the piano, was \$125; the value of the piano was \$250; the value of the residuary personal interest was \$160, \$135 being the value of the goods claimed to be exempt, leaving a balance of \$25.

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The questions raised for the decision of the Court were:—

“1. Is the widow entitled to claim the goods exempt by statute from seizure under execution, as being also exempt, so as not to be assets in the hands of the executors for the payment of debts?

“2. If the widow claims as her own property the piano specifically bequeathed to the said C. H. Tatham, is she bound to indemnify the specific legatee out of the personal property and insurance moneys taken by her under the will?

“3. Are the said insurance moneys to be taken by the legatees free from the claim of the London Life Insurance Company in respect of their advance? In other words, are the legatees entitled to have the insurance moneys exonerated by the general estate?

“4. If the insurance moneys are not to be exonerated out of the general estate, how is the burden to be borne as between the legatees? Is the gift to C. H. Tatham specific so as to throw the debt upon the residue, or do the legatees proportionately abate?

J. E. Jeffery, for the executors.

T. H. Luscombe, for Charles Heathcote Tatham.

R. K. Cowan, for the widow.

July 18. MEREDITH, C.J.:—The first question is as to the effect of R.S.O. 1897 ch. 77, sec. 4, the provisions of which are as follows:—

“The chattels so exempt from seizure as against a debtor shall, after his death, be exempt from the claims of creditors of the deceased, and the widow shall be entitled to retain the exempted goods for the benefit of herself and the family of the debtor, or, if there is no widow, the family of the debtor shall be entitled to the exempted goods.”

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The testator left goods and chattels, some of which he specifically bequeathed to his son Charles Heathcote Tatham. The residue of his personal estate he bequeathed to his widow.

The testator's debts, exclusive of the debt charged on his life insurance, to which I shall have occasion to refer later on, amount to \$160. The value of the goods and chattels passing under the residuary bequest, if the goods claimed by the widow to be hers under the provisions of the section I have quoted are to be included, is \$160, and the value of the goods so claimed is \$135.

The claim of the widow is, I think, well founded. The effect of the section on which the claim is based is, as I understand it, to give to the widow a parliamentary title to such of the goods of her deceased husband as would have been exempt from seizure under an execution against his goods. It is true that the Act in which the section is found is "An Act Respecting Execution," and the exemption, as far as the debtor himself is concerned, is one from seizure under execution; but the language of section 4 is much wider. After the death of the debtor, the exempted chattels are to be "exempt from the claims of creditors of the deceased," and to permit the personal representatives of the deceased to apply them in payment of the debts of the deceased would manifestly defeat the object and purpose of the Act. The words "entitled to retain" are not very well chosen, but when read with the subsequent part of the section it is reasonably plain that they are used as the equivalent of "be entitled to."

The section does not, however, free the exempted goods from liability for the funeral and testamentary expenses; and the exempted goods are therefore liable to satisfy these expenses.

It was argued, however, that the testator had assumed to deal with these goods and to bequeath them as part of the residue of his personal estate; and that the widow was, therefore, put to her election. The proposition on which the right to require the widow to elect is rested, is not, in my opinion, sustainable. There is nothing to shew that the testator intended to exclude the widow's right under the statute, and just as a devise by a testator of his lands *simpliciter* does not

put his widow to her election between her dower and the provision made by the will for her benefit, so the bequest here is not to be taken to include that to which the widow has a statutory title.

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It is true that the testator declares that the provisions made for his widow "are to be accepted by her in lieu of any dower out of, or any distributive share of" his estate; but, in my opinion, the right of the widow to the exempted goods is not covered by that language.

It was further argued that the provisions of sec. 4 of the Devolution of Estates Act, R.S.O. 1897 ch. 127, made all the personal property of the testator in the hands of his personal representatives subject to the payment of his debts; but I am of opinion that the two Acts must be read together, and sec. 4 of the Devolution of Estates Act as subject to the provisions of sec. 4 of the Execution Act.

The next question is as to a piano which is specifically bequeathed to the same son, but is really owned by the widow and was not the property of the testator. It is clear that, inasmuch as the testator assumed to dispose of the piano, the widow is put to her election, and if she is unwilling to consent to the son taking it and asserts her own title, she must make good to the son out of the property bequeathed to her the value of it.

The third question is as to the proceeds of the insurance dealt with in paragraph 5 of the will.

The testator, before the making of his will, had borrowed from the insurance company by which the policy was issued \$300, and had charged the policy with the payment of the loan and interest, and at his death there remained due the principal of this loan and \$13.20 for interest.

It is claimed by the widow that this debt should be paid either out the general personal estate of the testator, or, if not, *pro rata* by the persons taking the insurance money under the will according to their respective shares of it. This claim is resisted by the son, who contends that the debt is payable out of the residue of the insurance moneys bequeathed to the widow.

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The general personal estate not specifically bequeathed, including the residue of it bequeathed to the widow (for the bequest of the residue is not a specific bequest), must, of course, be first applied in payment of this debt, just as it is first applicable for the payment of any other debt of the testator.

The question as to the effect of the bequest of the insurance money, and whether the gift of the residue of them to the widow, remains to be considered.

The authorities are collected in Theobald on Wills, 5th ed., at p. 131.

After some fluctuation of opinion, I have come to the conclusion that the gift of the residue is specific. The testator shews, I think, that he was dealing with a fund of a specific amount, for he says: "And my policy of insurance issued by the London Life Insurance Company, and numbered 5,042, I hereby declare to be payable to and for the benefit of my wife and my son Charles Heathcote Tatham;" and he then proceeds to apportion the proceeds of the policy between them. The policy was for \$2,000, and having regard to the provisions of the Ontario Insurance Act, the effect of this was to declare that the \$2,000 payable by the policy should not go to his personal representatives, but that the wife and son should be the persons entitled to receive it; had no apportionment been made, it would have been divisible equally between them (R.S.O. 1897 ch. 203, sec. 159, sub-sec. 7), and the effect of the apportionment made is to declare that the division is not to be an equal one, but that the son is to be entitled to \$500 and the wife to the remainder of the sum assured, that is to say, \$1,500.

There is nothing in the will to indicate a contrary intention, and no reference to the charge which had been given on the policy.

It follows from the conclusion that the gift to the wife is specific; that so much of the charge as is not satisfied out of the general personal estate must be paid *pro rata* out of the respective shares of the wife and the son in the insurance moneys.

In re Butler, Le Bas v. Herbert, [1894] 3 Ch. 250, establishes that the legatees of the insurance moneys are not entitled to have the burden of satisfying the charge cast in

whole or in part on the subjects of the other specific devises or bequests, but must themselves bear that burden. Meredith, C.J.

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The contestants having each succeeded in part and failed in part will not receive or pay costs, and the costs of the executors will be paid out of the insurance moneys. RE TATHAM.

G. F. H.

[IN CHAMBERS.]

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IN RE SINCLAIR, CLARK V. SINCLAIR.

Aug. 20.

Will—Gifts to Issue—Lapse—Gift to Class—Executors—Purchase by Executor—R.S.O. 1897 ch. 128, sec. 36.

R.S.O. 1897 ch. 128, sec. 36, as to gifts to issue not lapsing, who leave issue on testator's death, applies only to cases of strict lapse and not to the case of gifts to a class, such as a residuary bequest "equally among my children share and share alike."

A testator died possessed of shares in a company. Afterwards, upon fresh allotments of stock being made, his executrix took up the additional shares, paying the premium out of her own money as to some of the shares and selling her right to others:—

Held, that she was not entitled as against the estate to such new shares, but only to a lien thereon for the amount advanced by her to take them up.

THIS was a motion under Consolidated Rule 938 on behalf of William Mortimer Clark, trustee under the will of John Sinclair, sr., deceased, and of Frank M. Gray, executor and trustee under the will of Catherine Sinclair, his widow, also deceased, for the purpose of ascertaining and determining (a) the persons composing the class or classes of persons and the proportion they should each receive under the third paragraph of the will of John Sinclair, sr.; (b) to whom the right to certain new stocks issued below the market price by the Western Assurance Company in respect of the shares belonging to the estate of John Sinclair, sr., but the income from which the said Catherine Sinclair was entitled to receive in her life time, belonged; (c) whether Frank M. Gray, as executor under the will of Catherine Sinclair, had power to appoint William Mortimer Clark as trustee of the estate of John Sinclair, sr., and convey the trust estate to him.

The testator, John Sinclair, died on August 14th, 1890, and by his will he appointed his wife, Catherine Sinclair, and his

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son John executors, and devised and bequeathed all his estate to them upon the following trusts:—

“(1) To pay my just debts, testamentary, and funeral expenses.

“(2) To permit my wife to enjoy the rents, interest, or annual income thereof during her life, or so long as she remains my widow, to her own use, with power to my said trustees to sell any part of my estate, real or personal, during my wife's life with her consent, or without it if she marries again, in which event my trustees shall invest the money to arise from said sale in mortgage securities, and shall pay the income thereof to my wife during her life, or so long as she remains my widow.

“(3) On the death or marriage of my wife to sell such part of my said estate as does not consist of money, and to divide the proceeds of my whole estate, real and personal, equally among my children, share and share alike, and I declare that my said trustees, or the survivor of them, may apply the interest of the share of any infant child or children towards his, her, or their maintenance and education till he, she, or they attain twenty-one years of age.”

A portion of the estate of John Sinclair, sr., at the time of his death, consisted of one hundred shares in the Western Assurance Company, with \$20 per share paid. In 1892 there was a fresh allotment of stock in the said Western Assurance Company, and the said Catherine Sinclair, as executrix, took up twenty additional shares and paid the premium thereon, in all \$510, out of her own moneys, so that on March 31st, 1892, there was standing on the books of the company 120 shares in the name of the said Catherine Sinclair as executrix of the said John Sinclair, sr., deceased. In 1893 there was a further allotment of stock, and the said Catherine Sinclair, as executrix, subscribed for eighty shares, and immediately sold her right to the same, applying the proceeds of the sale of said right of allotment to her own use.

The will of John Sinclair, sr., also contained the usual provision that the executor of his last surviving trustee might appoint a new trustee for the carrying out of the trusts con-

tained in his will, and convey to him the estate remaining to dispose of.

Catherine Sinclair survived the testator's son, John Sinclair, and died on April 13th, 1901, and probate of her will was granted to F. M. Gray, one of the present applicants, who, by deed of May 28th, 1901, purported to appoint William M. Clark trustee under the will of John Sinclair, sr., and to convey to him such portion of the estate as remained undisposed of. One of the testator's sons predeceased him, leaving a son, Clyne Sinclair. One of his daughters, who married Robert Dack, also predeceased him.

The motion was argued on June 10th, 1901, before FALCONBRIDGE, C.J.K.B., in Chambers.

W. A. Baird, for the plaintiffs.

W. M. Douglas, K.C., for James Sinclair, Isabella Snelgrove, Edwin G. C. Sinclair, Charles H. Sinclair, and Frank Sinclair, adult children of the testator.

A. F. Wilson, for Frank M. Gray.

J. Edgar, for Margaret Reid Sinclair, widow and administratrix of John Sinclair, jr., and for Edith G. L. Sinclair, daughter of John Sinclair, jr.

H. E. Harcourt, for the infant grandchildren of J. Sinclair, sr., other than Clyne Sinclair.

W. Davidson, for Clyne Sinclair.

J. H. Denton, for Robert Dack.

August 20, 1901. FALCONBRIDGE, C.J.: — After the argument I decided *ore tenus* that Frank M. Gray, as executor under the will of Catherine Sinclair, had power to appoint William Mortimer Clark, K.C., as trustee of the estate of John Sinclair, deceased, and to convey said trust estate to him; and also that the children of the testator, John Sinclair, who died after the testator and before the life tenant, took vested interests and were entitled.

Then as to the claim of the infant grandson, Clyne Sinclair, (whose father predeceased the testator, John Sinclair), to participate (question (a)):

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The rule appears to be so well settled in England that the 33rd sec. of the Wills Act (Imperial 1 Vict., ch. 26), which is practically identical with sec. 36 of our Wills Act (R.S.O. ch. 128), applies only to cases of strict lapse and not to the case of gifts to a class, that I am obliged to hold, notwithstanding *Totten v. Totten* (1890), 20 O.R. 505, that Clyne Sinclair is not one of the persons composing the class among whose members the proceeds of the estate are to be divided: *Olney v. Bates* (1855), 3 Dr. 319; *In re Sir E. Harvey's Estate, Harvey v. Gillow*, [1893] 1 Ch. 567; Theobald on Wills, 5th ed., pp. 268-9; Hawkins on Wills, 2nd ed., p. 85.

As to question (b), whether Catherine Sinclair, who was in her life time entitled to the receipt of the income from the estate of the said testator, John Sinclair, was entitled to new stock issued below the market price by the Western Assurance Company, it is quite plain that the answer must be in the negative on the authority of *Rowley v. Unwin* (1855), 2 K. & J. 138; *In re Pugh, Banting v. Pugh* (1887), W.N. 143; *Bouch v. Sproule* (1887), 12 App. Cas. 385; *In re Malam, Malam v. Hitchens*, [1894] 3 Ch. 578; Buckley's Companies' Acts, 6th ed., p 512.

She was, and her estate is, of course, entitled to a lien for the amount which she advanced to take up the stock, and she was likewise, of course, entitled to the increased income during her life time.

Costs to all parties out of the estate.

A. H. F. L.

[IN CHAMBERS.]

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FAHEY ET AL. V. JEPHCOTT.

Oct. 4.

Appeal—Conditional Allowance of—Reduction of Damages—Election—Further Appeal.

After the plaintiff's damages had been assessed by a jury, the trial Judge dismissed the action. The plaintiff appealed, and the Court of Appeal ordered that, if the plaintiff elected to reduce the damages assessed by the jury, her appeal should be allowed with costs, and judgment entered for her for the reduced amount with costs, or otherwise that there should be a new trial:—*Held*, that the plaintiff was entitled to have a clause inserted in the order of the Court protecting her, in the event of an appeal by the defendant to the Supreme Court of Canada, against her election to reduce the damages.

AN application by the plaintiff to vary the minutes of the certificate of the judgment of the Court of Appeal of the 21st September, 1901.

The action was brought by the plaintiff Ethel Fahey, an infant, and her father, Martin Fahey, to recover damages for injuries sustained by the infant plaintiff in the defendant's factory. The question of damages was left to the jury, who assessed them to the infant at \$3,000 and to her father at \$100. The trial Judge, however, dismissed the action (1 O.L.R. 18), whereupon the plaintiffs appealed to the Court of Appeal, who pronounced judgment to this effect: If the infant plaintiff consents to the damages assessed to her being reduced to \$1,200, the appeal will be allowed with costs, and judgment will be entered for her for that amount and for her father for \$100, with costs; otherwise the appeal will be allowed without costs and a new trial directed, the costs of the former trial to be in the discretion of and be disposed of by the Judge at the next trial.

The plaintiff Ethel Fahey desired to have a clause inserted in the certificate preserving her right to appeal as to the amount of damages in the event of an appeal by the defendant to the Supreme Court of Canada.

The motion was heard by OSLER, J.A., in Chambers, on the 3rd October, 1901.

Gordon Waldron, for the plaintiffs.

McGregor Young, for the defendant.

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October 4. OSLER, J.A.:—What the plaintiff proposes is reasonable. If she elects to accept judgment for the reduced amount, \$1,200, instead of a new trial, and the defendant should afterwards appeal, she ought to be in as good a position to insist on her right to the damages as assessed by the jury as she would be if she had accepted a new trial, and the defendant had appealed from that. We cannot prevent the defendant from appealing against either order, and the plaintiff's right to cross-appeal should be the same in the one event as it would be in the other. She ought to be in a position to say that the Court ought not to have imposed any condition at all if the defendant is not satisfied with the measure of relief this Court thought fit to award him.

The order may, therefore, contain a clause like this (or phrased otherwise as the parties agree):

"But in the event of the defendant appealing to the Supreme Court from the judgment of this Court, the plaintiff is to be at liberty (notwithstanding her election to reduce the verdict) to appeal, by way of cross-appeal or otherwise, as she may be advised, against this order, and to contend that she is entitled to judgment for the damages as found by the jury, without the imposition of any condition granting a new trial or reducing damages."

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Liquor License Act—Transfer of License—Premises to be Made “Suitable”—Powers of License Commissioners—Ratepayers’ Petition—Illegal Conduct—Injunction—Costs.

License commissioners appointed under the Ontario Liquor License Act have no power to say to an applicant for a transfer of a license that, if he will put certain premises into a suitable state for compliance with the law in the future, they will transfer a license to such premises; they are entitled to act under the statute only with regard to the existing state of facts, not to make promises as to the future, in such cases.

O’C., having no interest in the premises proposed to be licensed, and having no valid license at all, presented a petition to the commissioners for the transfer to these premises of a license standing in his name for other premises in which he had no longer any real interest. He supported this by the statutory ratepayers’ petition, which stated that the new premises were suitable for a tavern, whereas they admittedly did not possess the required accommodation, and that he was a proper person to become licensee of them. The commissioners heard petitions and counter-petitions upon the matter, and decided that they would allow the transfer of O’C.’s license to the new premises when they should be made suitable; but before that time arrived O’C., whose fitness for the transfer was one of the subjects of the petition, had ceased to have any interest in the matter, and was allowed to make over his right to K., who in this way escaped the necessity of obtaining the certificate of the ratepayers as to his fitness:—

Held, that this was illegal, and if the plaintiff had asked promptly for an injunction to prevent O’C., when he had no valid license and no interest in the new premises, from obtaining rights by asserting that he had, he might possibly have obtained some relief; but at the trial it was too late to interfere, for K. had obtained rights which could not be interfered with in his absence, and the license commissioners whose conduct was in question had ceased to hold office.

Held, also, that an offer made by the defendants to submit the question of the costs of the action to be disposed of in Chambers should have been accepted by the plaintiff, and, as it was not, the plaintiff was not entitled to costs against O’C.; and, as the unauthorized action of the license commissioners had caused the trouble, they should not have costs against the plaintiff.

ACTION by a ratepayer of the city of Toronto against the holder of a tavern license and the license commissioners for the year 1900 for a declaration of the invalidity of a transfer of the license and for other relief. The facts are stated in the judgment.

The action was tried before STREET, J., without a jury, at Toronto, on the 17th April, 1901.

J. A. Worrell, K.C., for the plaintiff.

L. V. McBrady, for the defendant O’Connor.

J. R. Roaf, for the defendants the license commissioners.*

*Upon the argument an unreported case (somewhat similar to this) of *Bannerman v. Lawyer* was referred to. It was decided by MEREDITH, C.J., in

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September 20. STREET, J.:—The facts are as follows:—

For some time prior to the 1st May, 1900, one Frawley carried on business as a tavern-keeper at 42 Colborne street, Toronto, his place of business being known as "The Hub." He had bought from Messrs. Cosgrave & Co., brewers, their rights under a lease of the property along with the fixtures and goodwill for a large sum of money, for which they held a mortgage upon the property transferred to him. The license commissioners notified Cosgrave & Co. that they would not renew Frawley's license, and that some other person must take over the tavern, or the license would be withdrawn from it. Thereupon they made an arrangement with Frawley and the defendant O'Connor by which Frawley's license was transferred to O'Connor on the 24th July, 1900. O'Connor, however, did not purchase either the lease or the goodwill or the fixtures at

the Weekly Court, on the 26th April, 1900; and his judgment was affirmed by a Divisional Court (ARMOUR, C.J., FALCONBRIDGE and STREET, JJ.) on the 5th June, 1900. Leave to appeal was refused by the Court of Appeal on the 29th June, 1900. No written reasons were given by any of the Courts, but the oral judgment of MEREDITH, C.J., was taken down in shorthand, and the part referred to on the argument was as follows: "With regard to the absence of the report of the inspector, I am very much inclined to think that that is a matter with which the Court has nothing to do. The absence of the report, I cannot think, would, where the license is issued, make the license void. Surely that is part of the internal machinery. The license commissioners probably would be derelict if, without such a report, they acted; but the statute seems to have laid down a course of procedure with regard to the removal of licenses which indicates that the time has not yet come for the procuring of that report. The inspector is, after the resolution is passed, to give a permit to the license-holder to remove from the licensed premises to other premises, and he is not to give the permission until the person applying has filed with the license commissioners a report of the inspector containing the information required by law in the case of an application for a license. In this case, no doubt, the reason why that has not been furnished is that the transfer was granted conditionally, as it were, upon the premises, which were not then fitted for the purpose of the business, being made so, and I have no reason, and no right, to doubt that the license commissioners, if that report be necessary, will require it to be procured before they proceed to act finally by permitting the business to be carried on in the new premises." This was upon a motion for judgment in an action for a declaration that the permit granted by the defendants the license commissioners to the defendant Lawyer for the removal of his business as a vendor of liquor under a shop license from one part of the city of Toronto to another,* was illegal. There were several grounds of illegality urged. That referred to in the above quotation was not the principal ground.

42 Colborne street. These, together with the liquors there, remained the property of Cosgrave & Co. under their agreement with Frawley. The real arrangement with O'Connor under which he took over the license and the possession from Cosgrave & Co. was, that they were to obtain the transfer of the "Hub" license to No. 280 Yonge street, Toronto, of which they had a lease, and which they were then fitting up so as to make it comply with the requirements of the Liquor License Act, and that, upon this being done, and the transfer of the license to these premises being obtained, he was to become the purchaser of the lease and goodwill of the new property. In the meantime he was to keep the license of the "Hub" property in force by continuing that business, keeping for himself any profits he made there. The position then was, that Cosgrave & Co. practically owned both the Yonge street property and the Colborne street property so far as the right of possession was concerned, as well as the goodwill and fixtures, and that O'Connor, with the license in his name, but without any other interest in the property, was managing the Colborne street business for Cosgrave & Co., taking as his reward any profits derived from it, and being indemnified by them against loss from it. Before the proposed purchase of the Yonge street property could be carried out, O'Connor changed his mind about it, and agreed to purchase from another brewer a different property altogether; so he, in his turn, having no interest in the Colborne street property, but having the license, put in a man named Clarke to look after it for him. In the meantime, on the 14th August, 1900, an application had been made by him for the transfer of his license from the Colborne street tavern to the proposed new one at 280 Yonge street, and the license commissioners had agreed to allow the transfer, subject to certain alterations being made there in order that it should comply with the law. On the 23rd August, 1900, the commissioners heard a deputation asking them to reconsider this decision, but, after hearing what they had to say, declined to alter it.

Messrs. Cosgrave & Co. were, therefore, then the owners of a lease of the tavern at 280 Yonge street, and O'Connor, who had no interest whatever in it, had a promise of a license to

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carry on business there, from the commissioners. The Cosgraves then found in one J. H. King a purchaser of their interest in 280 Yonge street, and, at their request, O'Connor applied to the commissioners for leave to transfer his license to King. This application was advertised, and was opposed by certain residents in the neighbourhood, but the commissioners, after hearing their arguments, granted the transfer to King on the 11th February, 1901.

The writ in the present action was issued on the 27th August, 1900, by a ratepayer of the polling sub-division No. 30 of ward 3, Toronto, in which No. 280 Yonge street is situated, and he was one of those who opposed the transfer to that place of O'Connor's license. The defendants are O'Connor and the three license commissioners for 1900 of the city of Toronto. The statement of claim, which was served on the 6th December, 1900, sets out the facts occurring before that date substantially as I have set them out, and asks for a declaration that the transfer of the license to No. 280 Yonge street, under the circumstances, was unauthorized and improper and void, and that the board of license commissioners had no jurisdiction to order the transfer, and that it should be annulled.

The cause being at issue and on the list for trial, on the 1st March, 1901, the defendants' solicitors wrote the plaintiff's solicitors pointing out that a new board of license commissioners having been appointed in 1901, the defendants the license commissioners were out of office and had no powers left them, and that, whether rightly or wrongly, O'Connor's license had been transferred by him to King, and that no good could, therefore, be obtained by proceeding to trial; and they proposed to submit the question of costs to the Master in Chambers for decision upon affidavit. The plaintiff, however, refused to adopt this suggestion, and proceeded to the trial of the action. I have stated above the general result of the evidence at the trial. At the time this action was begun O'Connor was the holder of the license for the business at 42 Colborne street, but he was really not the true owner of the business there carried on, and, therefore, under sec. 16* of the

* R.S.O. 1897 ch. 245, sec. 16—Subject to the provisions of this Act as to removals and the transfer of licenses, every license for the sale of liquor shall

Act, his license had ceased to be valid. This fact was not known to the defendants the license commissioners when, on the 14th August, 1900, they gave their consent to the removal of the license to the premises on Yonge street. These premises were, however, not yet provided with the accommodation required by law, and the consent to the transfer was only given conditionally on certain improvements being made. The license could not be transferred to any premises which were not fit for the purpose, and these premises were admittedly in a state which did not comply with the law. The commissioners were, therefore, legally unable to take any steps binding them to grant a transfer of the license. There were no premises in existence as to which a petition for a license could be presented to them; because the premises at 280 Yonge street had not the accommodation required by law for taverns, and were, therefore, not suitable for a tavern. There is no power given to license commissioners to say to an applicant for a transfer that if he will put certain premises into a suitable state of compliance with the law, in the future, they will transfer a license to the new premises; they are entitled to act under the statute only with regard to the existing state of facts, not to make promises as to the future, in such cases. The evident intention of the Act* is, that all parties concerned, license commissioners,

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be held to be a license only to the person therein named and for the premises therein described, and shall remain valid only so long as such person continues to be the occupant of the said premises and the true owner of the business there carried on.

*R.S.O. 1897 ch. 245, sec. 38 (1)—Any inspector may, after resolution of the license commissioners allowing the same, and subject to the provisions of sub-section 14 of section 11 of this Act, issue to the holder of any license, or his assigns or legal representatives . . . a permit to remove from the licensed premises to other premises, to be described in an indorsement to be made by the inspector on the license, and situate within the same municipality, and possessing all the accommodation required by law. (2) . . . but no such permission shall be granted unless and until the person applying therefor has filed with the license commissioners a report of the inspector containing the information required by law in case of application for a license.

Section 11, sub-sec. 14— . . . In the case of an application for such license for or transfer thereof, to premises which are not then licensed, the petition must be accompanied by a certificate signed by a majority of the electors, etc.

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inspector, and ratepayers, looking at the premises proposed to be licensed and the person who is to receive the license, and who must be the true owner of the business at the time, shall arrive at a conclusion upon existing facts, whether the application should be granted. To act with a view to what may be the state of things in the future, as the commissioners here did, and to receive and act on a petition months in advance of the time when they could properly transfer the license, is to open the door to the breaches of the Act which have taken place here. O'Connor, having no interest whatever in the Yonge street premises, and having no valid license at all, presented a petition to the commissioners for the transfer to these premises of the license standing in his name for the Colborne street premises. He supported this by the statutory ratepayers' petition, which stated the Yonge street premises to be "suitable" for a tavern, whereas they admittedly did not possess the required accommodation, and that he was a proper person to become licensee of them. The commissioners heard petitions and counter-petitions upon the matter, and decided that they would allow the transfer of O'Connor's license to the new premises when they should be made suitable; but before that time arrived, which was months afterwards, O'Connor, whose fitness for the transfer was one of the subjects of the petition, had ceased to have any interest in the matter; being treated, however, as having acquired a right to the transfer, he was allowed to make over his right to King, who in this way escaped the necessity of obtaining the certificate of the ratepayers as to his fitness.

Long before the present case was brought on for trial, however, the defendants the license commissioners had ceased to hold office, and the defendant O'Connor had ceased to have any possible interest in the license, and the license itself came to an end on the 1st May, 1901, within two weeks after the trial of the action. No diligence was used to bring the case on for trial, for, although the writ was issued on the 27th August, 1900, the statement of claim was not filed until the 6th December following. If the plaintiff had asked promptly for an injunction to prevent O'Connor, when he had no valid license and no interest in the Yonge street property, from

obtaining rights by asserting that he had, possibly he might have obtained some relief, although I do not desire to be considered as expressing any opinion upon the point; but at the trial it was too late to interfere; for King, the new licensee, had obtained rights which could not have been interfered with in his absence, and the declarations asked for as to the invalidity of the action of the license commissioners were useless as against the persons defendants in the action. There was really, therefore, no object to be attained by bringing the case on for trial, and the offer to dispose of the costs in Chambers made by the defendants' solicitors was a proper one, and should have been accepted. I do not give the plaintiff any costs against O'Connor, as I otherwise should, because this offer was not accepted: see the cases cited at p. 1249 of Holmsted and Langton. I think that the defendants the license commissioners should have refused to act upon the petition of O'Connor when they found, as they plainly did, that the premises at the time the petition was presented were utterly unsuitable for the purposes of a tavern as required by the Act; they had no power or jurisdiction to deal with the matter at that stage; and, as their unauthorized action has caused the trouble, I do not think they should have their costs.

The action will, therefore, be dismissed without costs.

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Oct. 16.

[COURT OF APPEAL.]

BEAM V. BEATTY.

Arrest—Application for Discharge—Onus—Intent to Defraud—Former Absconding—Insolvency—Bond—Restoration.

The expected departure from Ontario with intent to defraud is an essential ingredient of the case to be made out by the applicant for an order of arrest, but it is a question of fact, and the Judge may infer it from the facts and circumstances shewn by the affidavits. The decision of the Judge who grants such an order is subject to review, but the onus of shewing that he was wrong rests upon the party who complains of it. Under the circumstances of this case the order was rightly made. The former conduct of the defendant in respect to the same debt was a fact or circumstance to be taken into consideration on the question of intent. The impecunious or insolvent condition of the defendant does not, of itself, minimize or rebut the fraudulent intent.

Decision of a Divisional Court, 19 P.R. 207, reversed.

Held, also, that the order of the Court below directing that the bond given by the defendant should be delivered up and the surety therein released, was erroneous; the bond ought to have remained upon the files of the Court, being a record thereof; and the order ought only to have directed that an *exoneretur* be entered thereon; therefore the bond should be restored.

AN appeal by the plaintiff from an order of a Divisional Court reversing an order of Street, J., in Chambers, and discharging the defendant from custody under an order for arrest in the nature of a *ca. re.*

The facts are stated in the opinions of the Judges in the Court below, reported 19 P.R. 207.

The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 4th February and 18th March, 1901.

A. C. McMaster, for the appellant.

C. A. Masten, for the defendant.

ARMOUR, C.J.O.:—The judgment of Ferguson, J., in the Divisional Court is, in my opinion, right.

I had occasion to deal with a similar question to the one involved in the appeal in *Coffey v. Scane* (1894), 25 O.R. 22, and I have neither seen nor heard anything since to induce me to change the opinion I there expressed.

The order of the Divisional Court, as drawn up, directed that the bond given by the defendant in the action be cancelled and that it be delivered up to the defendant and that the

surety therein be released. This was plainly erroneous, for the bond ought to have remained upon the files of the Court, being a record thereof, and the order ought only to have directed that an *exoneretur* be entered thereon.

The appeal will be allowed with costs here and below, and the order of this Court will be that the said bond be restored to the files of the Court.

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October 16. OSLER, J.A.:—The material facts are fully, and, I think, quite accurately, stated in the judgment of my brother Ferguson in the Court below. The plaintiff's debt or other cause of action was proved, and the only question is, whether facts and circumstances were shewn sufficient to satisfy the Judge who made the order for the defendant's arrest that there was good and probable cause for believing that the defendant, unless he was forthwith apprehended, was about to quit Ontario with intent to defraud his creditors generally or the plaintiff in particular.

The decision of the Judge who grants such an order is no doubt subject to review, but the onus of shewing that he was wrong rests upon the party who complains of it.

The expected departure from Ontario must be with intent to defraud. That is an essential ingredient of the case to be made out by the applicant for the order. The statute requires it, but it is a question of fact, and the Judge may infer it from the facts and circumstances shewn by the affidavits, just as any other relevant fact may be inferred from those positively deposed to: *Erickson v. Brand* (1888), 14 A.R. 614, 653.

When the transactions occurred out of which the plaintiff's cause of action arose, the defendant was a citizen of and domiciled in the United States. He came over to this country and took up his residence here, temporarily, no doubt, but for the purpose of engaging in business as agent for some company calling itself the Colorado River Irrigation Company, and there is evidence abundantly sufficient to establish a *prima facie* case, which is all that is at present necessary to be made out, that in the course of these dealings he obtained money from the plaintiff, and probably many other

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persons, by means of a gross fraud, and, after having made an appointment with the plaintiff for the purpose of repaying the moneys thus obtained or part thereof, failed to keep it, and absconded from the Province, returning to the States. That he might then lawfully have been arrested if he could have been caught, even though a foreigner and only temporarily resident here, I think admits of no doubt upon the decided cases: *Kersterman v. McLellan* (1883), 10 P.R. 122. The inference that he then intended to depart, and actually departed, with intent to defraud, can hardly be resisted. After the lapse of a few years he ventured back and began to engage, at a town on the Provincial border, in doing business for another company, "The Sutherland Construction and Improvement Company of New York." The plaintiff (paragraph 2 of affidavit of the 26th March, 1900) recently endeavoured to obtain a settlement of his claim, but the defendant, though he promised to settle, put him off and made all kinds of excuses. Being about to leave the Province again without paying or settling with the plaintiff, an order was made for his arrest, which has been set aside by a Divisional Court (Chancery Division).

I think the order was rightly made, under the circumstances, and should not have been set aside. Conceding, as I do, that in the case of a foreigner something more than his mere intended departure ought to be shewn in order to warrant a Judge in inferring therefrom an intent to defraud, I am of opinion that quite enough was proved here to justify such an inference. I agree with Ferguson, J., in saying that the defendant was not, either in 1893 or when the order in question was made, "in the position of a person who comes to this country upon an errand, or is passing through the country. He was in this country, living here, and doing and transacting important business here."

I also agree that "the former conduct of the defendant in respect to the same debt constitutes a fact or circumstance which may well be taken into consideration on the question of the intent to defraud." If he was under the circumstances justly liable to arrest when he first left the country, then returns and again does business here, and is again about to depart without

discharging, but, on the contrary, contemptuously disregarding, his old liabilities, I am, for my own part, with all respect, quite unable to see how a Judge who infers that such intended departure is with intent to defraud his old creditors, can be said to be wrong.

I agree with the views of my learned brothers Ferguson and Street in this case, and, having already frequently expressed my views on the subject in reported cases, feel it unnecessary to write at greater length on this occasion. I will only add that the impecunious or insolvent condition of the defendant does not, by itself, minimize or rebut the fraudulent intent.

The order of the Divisional Court should, in my opinion, be discharged, and the orders thereby reversed and set aside be restored, with costs throughout, and the defendant ordered to restore the bond or other security to the files of the Court.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

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Sept. 28.
Oct. 17.

[IN CHAMBERS.]

WARD V. BENSON.

Security for Costs—Defendant out of Jurisdiction—Surrogate Court Proceedings—Real Actor.

The plaintiff applied to a surrogate court for grant to him of letters probate as the executor named in a will. The defendant having filed a caveat and entered an appearance, the plaintiff delivered a statement of claim praying the court to decree probate of the will in solemn form, and the defendant delivered a statement of defence disputing the factum of the will. The plaintiff then obtained an order for the removal of the proceedings into the High Court :—

Held, that, according to the practice and procedure of the High Court, which was applicable, the plaintiff was not entitled to security for costs from the defendant, who was out of the jurisdiction.

AN application by the plaintiff for an order requiring the defendant to give security for the plaintiff's costs of this action, which arose out of surrogate court proceedings to prove the will of Ellen Jane Ward, deceased. The defendant having filed a caveat against the proof of such will without notice to him, the plaintiff, who had propounded the will, filed and served a statement of claim in which he claimed that the surrogate court should decree probate of the will in solemn form, and the defendant thereupon filed and served his statement of defence, in which he alleged that the deceased was not of sound and disposing mind, memory, and understanding at the time of the making of the will, and that it was not duly executed in accordance with the provisions of the Wills Act of Ontario. An order was subsequently made transferring the proceedings into the High Court of Justice.

The present application was made upon the ground that the defendant was out of the jurisdiction, and was of no financial worth, and had no assets in Ontario, and, therefore, being the real actor, should be ordered to give security for the plaintiff's costs.

The motion was heard by Mr. Winchester, the Master in Chambers, on the 25th September, 1901.

W. J. Elliott, for the plaintiff, relied on *Apollinaris Co. v. Wilson* (1886), 31 Ch. D. 632.

H. A. E. Kent, for the defendant, cited *In re Miller's Patent*, [1894] W.N. 4.

September 28. THE MASTER IN CHAMBERS :—The case of *In re Miller's Patent*, [1894] W.N. 4, is more fully reported in 11 R.P.C. 55, and, in my opinion, governs this application. Mr. Justice Kekewich, in delivering his judgment, considered the case of *Apollinaris Co. v. Wilson*, 31 Ch. D. 632, and also that of *Vavas seur v. Krupp* (1878), 9 Ch. D. 357, and pointed out very distinctly the difference of a party applying to the Court and a defendant made a party and thus brought before the Court. It is true that in the present case the defendant came before the Court in the first instance of his own motion, but, coming here, the plaintiff takes the usual proceedings to retain him within the jurisdiction of the Court, and is, therefore, not entitled to security for costs from him; and it is immaterial upon whom the onus lies to begin: see *In re Miller's Patent*, 11 R.P.C. at p. 57.

The motion will be refused with costs in any event to the defendant.

The plaintiff appealed from this decision, and the appeal was heard in Chambers by Moss, J.A. (sitting by request as a Judge of the High Court), on the 7th October, 1901.

The same counsel appeared.

October 17. Moss, J.A.:—The proceedings were commenced in the surrogate court by an application on behalf of the plaintiff for grant of letters probate to him as the executor named in the will of one Ellen Ward. In consequence of a caveat filed on behalf of the defendant and the usual steps following thereupon, an appearance was entered in the surrogate court by the defendant, and the proceeding became a contentious proceeding under the Surrogate Court Rules, 1892, "Contentious Business." Thereupon the plaintiff filed and delivered a statement of claim, the parties thereto being the plaintiff and the defendant. The plaintiff therein prayed the Court to decree probate of the will in solemn form. The defendant filed and delivered a statement of defence setting up testamentary incapacity and non-execution of the will in accordance with the provisions of the Wills Act. In effect he disputed the factum of the will.

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The result of these proceedings was, that in the surrogate court the practice and procedure of the High Court was to be followed : Surrogate Rules, 1892, "Contentious Business."

The plaintiff moved for and obtained an order for the removal of the proceedings into the High Court. It now lies with the plaintiff to prosecute the matter to trial and adduce evidence in support of the factum before the defendant is called upon to enter upon his defence if he proposes to do more than cross-examine the plaintiff's witnesses.

I do not think that according to the practice and procedure of the High Court a plaintiff in the position of this plaintiff is entitled to call upon a defendant in the position of this defendant to give security for costs.

The case of *Lambert v. Bassett* (1877), 11 Ir. Rep. Eq. 291, upon which reliance was placed, was rested by the Probate Judge upon the General Orders and practice of the Probate Court in Ireland. Here the case must be governed by our practice and procedure.

I affirm the Master's order with costs to the defendant in any event.

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[DIVISIONAL COURT.]

D. C.

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SCOTTISH AMERICAN INVESTMENT CO. V. BREWER ET AL.

June 27.
Sept. 30.
Oct. 14.

Mortgage—Foreclosure—Opening up—Subsequent Incumbrancer.

Mortgagees obtained the usual judgment against the mortgagor and his wife for redemption or foreclosure on the 5th April, 1900. The Master added as defendants a subsequent mortgagee and creditors of the mortgagor having a *fi. fa.* lands in the hands of the sheriff, and by his report, dated the 16th May, 1900, certified that the execution creditors had not proved any claim, and appointed the 17th November, 1900, for payment by the subsequent mortgagee. Payment not having been made, a final order of foreclosure as to the added defendants was issued on the 21st November, 1900. The Master thereupon made a subsequent report appointing the 29th December, 1900, as the day for payment by the original defendants; and payment not having been made by them, a final order of foreclosure was issued against them on the 29th January, 1901. On the 3rd April, 1901, the execution creditors served a notice of motion to open the foreclosure. On the same day the mortgagees had written to the mortgagor offering to give them, as of grace, a part of any surplus over their claim which they should realize by a sale of the mortgaged premises, upon the mortgagor agreeing not to move to open the foreclosure:—

Held, that the execution creditors, having moved with reasonable promptness, and being in a position to give the mortgagees immediate payment, were, under the circumstances detailed in the evidence, entitled to have the foreclosure set aside and to be let in to redeem upon the usual terms.

Thornhill v. Manning (1851), 1 Sim. N.S. 451, followed.

AN application on behalf of the Traders Bank of Canada for an order opening up a final order of foreclosure and allowing the applicants to redeem the plaintiffs. The facts are stated in the judgment of the Master.

The application was heard by Mr. Winchester, the Master in Chambers, on the 14th June, 1901.

A. H. F. Lefroy, for the applicants.

W. H. Lockhart Gordon, for the plaintiffs.

June 27. THE MASTER IN CHAMBERS:—This action was brought by the plaintiffs for the purpose of foreclosing two mortgages made by the defendant Brewer and his wife on two properties situate in Toronto, one at the north-east corner of Queen street and Spadina avenue, and the other at the south-west corner of Adelaide street and Spadina avenue. A judgment of reference was issued dated the 5th April, 1900, referring it to the Master in Ordinary to take all necessary accounts and proceedings for redemption or foreclosure. In

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proceeding the Master added Robert Davies, a subsequent mortgagee, and the applicants herein, the Traders Bank of Canada, as parties defendants. By his report dated the 16th May, 1900, the Master certified that there would be due on the 17th November, 1900, the date appointed for payment, to the plaintiffs the sum of \$30,393.57, and to the defendant Robert Davies \$2,622.93, and that the Traders Bank of Canada had not proved any subsisting lien, charge, or incumbrance upon the lands and premises in question. The 17th November, 1900, was the date appointed for the payment of the above \$30,393.57 by the defendant Davies to the plaintiffs. That sum not having been paid on that day, a final order of foreclosure issued on the 21st November, 1900, foreclosing the defendants Robert Davies and the Traders Bank of Canada from all right, title, and equity of redemption of, in, and to the mortgaged premises. The Master in Ordinary thereupon made a subsequent report in which he found due to the plaintiffs \$29,946.87 and directed the original defendants to pay the same on the 29th December, 1900. The plaintiffs, having received certain rents, gave notice of motion on the 23rd January, 1901, to the original defendants in which they gave credit for \$363 on their mortgages, and asked that on the return of the motion a final order of foreclosure should be made against the original defendants; and thereupon, on the 29th January, 1901, no one appearing for these defendants, a final order absolutely debarring and foreclosing these original defendants of and from all right, title, and equity of redemption of, in, and to the mortgaged premises, was made.

On the 3rd April, 1901, the defendants the Traders Bank served a notice of motion returnable on the 12th April, 1901, for an order setting aside the final order of foreclosure obtained herein and allowing the applicants to redeem the plaintiffs, upon the ground that the said final order of foreclosure was irregularly obtained, inasmuch as certain rents having been collected from the property in question in this action pending the foreclosure proceedings, a new day for redemption should have been fixed, and also upon the ground that the true value of the said property had only recently become known to the applicants, and on the ground of agreements and understandings between

the plaintiffs and the original defendants by writ having been entered into pending the proceedings in this action prejudicial to the interests of the applicants and other creditors of the defendants by original writ, without the knowledge and consent of the applicants and the said other creditors, and upon other grounds disclosed in the affidavits filed and the depositions taken.

In support of their application the applicants have filed affidavits from Mr. Strathy, their manager, F. B. Clisdell, and Edward Wheeler, and have examined Mr. Gordon, the plaintiffs' solicitor, one C. C. Clark, a son-in-law of the defendant Brewer, and the defendant Robert Davies, while the plaintiffs have examined one Abram Orpen and filed the affidavits of James Brandon and G. T. Locke.

The evidence shews that the applicants did not prove their claim in the Master's office because of the large amount of the plaintiffs' claim and the belief of the manager as to the value of the mortgaged property and the dislike of the bank to be loaded up with a lot of real estate; that the position of matters was only recently brought to the manager's attention by one Orpen offering to purchase the applicants' claim herein, provided that the applicants would get the final order of foreclosure opened up and be permitted to redeem the plaintiffs.

The applicants entered into an agreement with Orpen, accordingly, on the 3rd April, 1901, in which it is recited that the party of the first part (Orpen) having requested the party of the second part (the Traders Bank) to take proceedings, by virtue of certain writs of execution held by them, to cause to be opened the foreclosure obtained by the plaintiffs herein, and which the party of the second part has agreed to do by taking proper proceedings therefor in the said action, Orpen thereby agreed to indemnify and save harmless the bank against all costs and charges incurred by the latter in connection with such proceedings, and also to deposit in the bank before the return of any motion to open the foreclosure sufficient to redeem all moneys claimable by prior incumbrancers upon the property in priority to the bank, or otherwise to satisfy the bank that such moneys when so required to redeem such prior incumbrancers shall be forthcoming when necessity arises in the course of such

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proceedings; and Orpen thereby further agreed that, if such proceedings to open up the foreclosure be successful and the bank be let in to redeem the lands in question, he would forthwith pay to the bank \$1,500 in consideration of the bank assigning to him all its claim against the land under its writs of execution; and the bank thereby agreed that, in consideration of the said sum of \$1,500, it would, upon payment of \$1,500, forthwith assign to Orpen all its said claims.

It was also thereby agreed that the bank would, upon request of Orpen, at any time, discontinue the proceedings contemplated by the agreement, and also, if requested by Orpen, it would continue such proceedings by way of appeal or otherwise according to the law or practice so long as requested by Orpen so to do; and Orpen thereby agreed that he would fully indemnify the bank against all costs or charges incurred in such proceedings.

The solicitor for the plaintiffs examined Mr. Orpen in answer to the application, and his examination shews that, previous to the plaintiffs obtaining the final order of foreclosure, he retained Mr. Cayley, an estate agent, to purchase part of the property in question, namely, that on the corner of Queen street and Spadina avenue. He was not aware that the plaintiffs' mortgage covered the property on the corner of Adelaide street and Spadina avenue as well. He states that Mr. Cayley on his behalf offered \$28,500 for the Queen street property, but that the plaintiffs' solicitors refused to accept this or any sum, as they had not obtained the final order at that time, but that he was to see the plaintiffs' solicitors about the sale after they had obtained the final order; that he did see them after that, and they refused to sell the property. Subsequently Mr. Orpen ascertained that both properties were covered by the plaintiffs' mortgages, and he thereupon negotiated with a Mr. Clisdell, who had previously made him an offer to purchase the Queen street property, to amend his offer so as to cover the Adelaide street property as well, and this he did, by making an offer of \$34,500 for both properties. In his evidence Orpen states that he intended with this sum to pay off the plaintiffs' mortgage, give Brewer \$1,500, the Traders Bank \$1,500, and retain the balance for his own services. It appears that Mr. Clisdell

attempted to purchase the properties from the plaintiffs previous to his making this offer to Mr. Orpen, but, upon applying to the plaintiffs' solicitors as to the price, he was told that they wanted \$45,000 for the Queen street property and \$5,000 for the Adelaide street property as the least they would accept for the properties. It appears that Brewer, through his son-in-law, one Clark, was attempting to get some benefit out of the property from the plaintiffs' solicitors, and on the 3rd April, the date upon which the applicants herein served their notice of motion, the plaintiffs' solicitors wrote Brewer as follows:—

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"3rd April, 1901.

"John Brewer, Esq.,

"Bowmanville, Ont.

"Dear Sir:—The enclosed letter will explain the arrangement I am prepared to recommend the Scottish American Investment Company to make with you regarding your application to us for a loan to help you to open up the foreclosure proceedings regarding the O'Hara avenue and Queen street west properties lately foreclosed by Mr. Davies, also with regard to any surplus there may be if we should be able to sell the Spadina avenue and Queen street properties and the Spadina avenue and Adelaide street property mortgaged to this company.

"Before, however, recommending this proposition to my company, I want you to consult your own solicitor and see whether this is a fair arrangement for you, as I do not want you to enter into any arrangement that may not be considered perfectly fair to you, and which you may not clearly understand, and anything done now I want to be final, so that no question could arise hereafter as to its propriety or finality."

The letter which Mr. Gordon, the plaintiffs' solicitor, drew up to be signed by Brewer, containing the arrangement he would recommend the plaintiffs to make, reads as follows:—

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"Toronto, 3rd April, 1901.

"W. H. Lockhart Gordon, Esq.,

"Agent Scottish American Investment Company,

"Ltd., Toronto.

"Dear Sir:—In consideration of your company lending me and my wife, or procuring for me and my wife, a loan of \$4,500 on the security of houses numbers 51, 53, and 55 on the east side of O'Hara avenue, and also on the cottage and lot immediately to the south thereof, and on the store number 1530 Queen street west, we hereby agree never to move the Court to open up the foreclosure of the two properties on the north-east corner of Queen street and Spadina avenue, in the city of Toronto, which we mortgaged to you under mortgages made on or about the 14th November, 1890, 23rd June, 1892, and 5th May, 1893, or to make any claim against your company for any moneys you may realize out of these properties over and above the amount of your claim under the said mortgages; it being understood with you that, in the event of your selling these properties for more than the amount of your claim, you will give us one-half of whatever you may realize over an above the amount of your claim up to, but not exceeding, \$4,000, or will convey to us the Broadview Hotel property on Spadina avenue, whichever your company prefer.

"It being further understood and agreed between us that we are to have no voice in the selling of any of these properties, and no time is limited within which you are to sell the same, but it is to be in your absolute discretion to sell the said properties at any time that may seem to you fit, and for any price, and on any terms and conditions that may be suitable to you, without reference to us or either of us; we admitting that the final order of foreclosure which you have obtained against us on the above-mentioned mortgages is an absolute good and final order of foreclosure and incapable of being opened up, and it is only through your liberality that we are to receive anything further out of these properties if you should sell them for more than the amount of your claim, and then only when you realize on any mortgages that may be given you for part of the purchase money."

Mr. Gordon in his evidence states how he came to make this proposition. Mr. Davies, the second mortgagee, had made an application in this action to open up the final order of foreclosure, and Mr. Gordon in his evidence says: "After these proceedings were commenced by Mr. Davies, Mr. Clark (Brewer's son-in-law) came in to see me, as he had more than once come to see me before, to see how we were getting on and what we were doing with the property and one thing and another, and I am prepared to say this, that, although we never had any agreement with Mr. Brewer or Mr. Clark about paying them anything, giving them any share, yet it was always my intention to have advised my company, if we made more out of the property than would cover our claim, to see if the company would give them something, and when these proceedings were commenced by Mr. Davies to open up the foreclosure, I told Mr. Clark that."

It appears that the application of Mr. Davies to open up the final order of foreclosure was not proceeded with, owing to his mortgage being paid off by means of some property other than that in question herein.

The plaintiffs have filed two affidavits as to the value of the properties herein. Mr. Brandon, an estate agent, places the value of the Adelaide street and Spadina avenue property at \$4,070 and the Queen street and Spadina avenue property at \$26,780, while Mr. Locke places them at \$5,355 and \$26,105, respectively, and while the plaintiffs' solicitors, themselves, asked \$5,000 and \$45,000, respectively, for the same, and Mr. Clisdell offers Mr. Orpen \$34,500 for both properties.

It is evident that the properties are sufficient to more than pay off the plaintiffs' claim and leave something for the subsequent incumbrancers.

As to the ground of irregularity in not appointing a new day for redemption, the rule is, undoubtedly, to appoint a new day where the plaintiff has received sums on account of his mortgage security and not given credit or notice of credit of the same before the time for redemption has expired. The plaintiffs herein gave a notice of motion to the original defendants for the final order, and in it gave credit for \$363 rents received by them, returnable on the 29th January, 1901, or just

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one month after the day for redemption, and upon the return the final order was granted. I understood that counsel for the applicants admitted on the argument that he did not complain of any irregularity in obtaining the order. It is shewn by the evidence of Mr. Gordon that the position of the plaintiffs with reference to the property since obtaining the final order has not differed from the position they occupied previous to obtaining that order. They were in possession of the premises and collecting the rents under leases given before the foreclosure proceedings, at least as to the hotel on the corner of Adelaide street and Spadina avenue, and as to the other property under leases as monthly tenants.

The question is: Is the bank as a subsequent incumbrancer entitled, under the circumstances above detailed, to an opportunity of redeeming the plaintiffs herein?

In *Thornhill v. Manning* (1851), 1 Sim. N.S. 451, Lord Cranworth, in referring to the rule as to opening a decree of foreclosure, at p. 454, said: "It is quite impossible to lay down any general rule as to the circumstances which will induce the Court to open a decree of foreclosure; but this I must observe, that the Court has a very strong inclination to give assistance to a mortgagor, if he applies promptly and the Court has the means of giving the mortgagee immediate payment: and perhaps that is the only clue which the Court has to guide it. . . . I think that the promptness of the mortgagor is the great and important feature in the case which must guide the Court in deciding as to what it ought to do." In that case the decree was dated the 7th June, 1850, the Master's report the 3rd August, 1850, and the final order of foreclosure the 12th February, 1851; the notice of motion was dated the 11th April, 1851, and the application heard on the 3rd June. The final order of foreclosure was opened up, upon the defendant paying the amount due to the plaintiff, as reported, on or before the 10th June, 1851; the time for redemption was enlarged for a month, and a reference was directed to the Master to take the account.

This decision was followed in *Campbell v. Holyland* (1877), 7 Ch. D. 166, and in *Ingham v. Sutherland* (1891), 63 L.T.N.S. 614. It was also followed in our own Courts in *Platt v.*

Ashbridge (1865), 12 Gr. 105, and in *Trinity College v. Hill* (1894), 10 A.R. 99, and the cases referred to therein by Mr. Justice Osler.

I have no doubt in my own mind that, had the defendant Brewer made the application to open up the foreclosure, upon the evidence before me he would have been successful, and it may have been that, had it not been for the promise of the plaintiffs' solicitor and agent to do what was right with him when the property was sold, he would have made such an application. Should subsequent incumbrancers, to whom the mortgagor is still indebted and will remain so until he has settled with them, or they have been paid by means of the mortgagor's estate, be treated in a different manner? In my opinion, the incumbrancers have greater interests in the mortgagor's estate than even the mortgagor; they are entitled to be paid out of his estate; or, as was stated in *Illinois Starch Co. v. Ottawa Hydraulic Co.* (1888), 125 Ill. 237, "The statute allowing redemption in such cases, intends to make the property pay as much of the mortgagor's debt as it is worth."

By the carrying out of the proposed arrangement between Mr. Gordon and Brewer the latter's creditors would have suffered, and such a proceeding should be prevented.

In my opinion, justice demands that the defendants the Traders Bank have an opportunity of redeeming the plaintiffs, and thereby securing at least a portion of their indebtedness.

I will take the account of the amount due to the plaintiffs, in Chambers, and upon the defendants paying the same within seven days thereafter the plaintiffs will stand redeemed. Of course the plaintiffs will be entitled to their costs of this application, although not to the costs of the affidavits of the estate agents, nor their fees for valuing; otherwise their costs will be taxed to them and added to their claim, they giving credit for the rents received by them since they last accounted for the same. In case the parties do not agree to this manner of ascertaining the amount due, there will be a reference back to the Master, and he will appoint a month after his report for redemption by the bank. The defendant Brewer is to be notified to attend on the taking of the plaintiffs' account and proving the defendants' claim.

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The plaintiffs appealed from this order, and their appeal was heard by FALCONBRIDGE, C.J.K.B., in Chambers, on the 6th September, 1901.

W. H. Lockhart Gordon, for the plaintiffs, contended that the proceedings were really carried on by Orpen, who was a mere speculator, and not entitled to the indulgence of the Court; that the bank had been utterly careless in the whole matter, and should not now be allowed to redeem for Orpen's benefit. He referred to *Patch v. Ward* (1867), L.R. 3 Ch. 203, 18 L.T.N.S. 134; *Thornhill v. Manning*, 1 Sim. N.S. 451; *Brothers v. Lloyd* (1867), 2 Ch. Ch. 119; Rule 749.

A. H. F. Lefroy, for the defendants the Traders Bank of Canada, contended that a final order of foreclosure was never treated as really final; that the mortgage still continued only as a security; that the object of the final order was no doubt to enable the mortgagee to deal with the property as his own; but, if he had not done so, and the position of the parties was not altered so as to make it inequitable to open the foreclosure, and a reasonable excuse for not redeeming in time was alleged, the Court would not refuse to open the foreclosure. He cited the *Encyclopædia of the Laws of England*, vol. 5, p. 411; *Daniell's Chancery Practice*, 6th ed., p. 1408; *Campbell v. Holyland*, 7 Ch. D. 166; *Trinity College v. Hill* (1882), 2 O.R. 348, 10 A.R. 99, 107, 108; *Johnston v. Johnston* (1882), 9 P.R. 259, 265; *Scarlett v. Birney* (1893), 15 P.R. 283; *Independent Order of Foresters v. Pegg* (1900), 19 P.R. 254; *Abney v. Wordsworth* (1701), 9 Sim. 317n; *Soley v. Salisbury* (1725), 9 Mod. 153; *Manfan v. Perkins* (1766), 9 Sim. 308; *Platt v. Ashbridge*, 12 Gr. 167; *Waddell v. McColl* (1866), 2 Ch. Ch. 58, 62; *Johnson v. Ashbridge* (1867), *ib.* 251. As to applicants being judgment creditors, and not mortgagees, he referred to *Crisp v. Heath* (1715), 7 Vin. Abr. 52, pl. 2, and *Greswold v. Marsham* (1685), 2 Ch. Cas. 170.

H. C. Fowler, for the defendants *Brewer et ux.*

September 30. FALCONBRIDGE, C.J.:—The learned Master has given the matter his usual careful attention, and, in my opinion, has disposed of it with his usual good judgment.

I have been unable to find valid reasons for arriving at a conclusion different from his, and the appeal must, therefore, be dismissed with costs.

Mr. Fowler's clients will have such further time as may be necessary to take advantage of the proceedings.

The plaintiffs again appealed, and their appeal was heard by a Divisional Court composed of FERGUSON and MEREDITH, JJ., on the 14th October, 1901.

W. H. Lockhart Gordon, for the appellants. The bank have practically abandoned their claim by not proving in the Master's office, which under Rule 749 amounts to a disclaimer or an election. A decree of foreclosure can be opened only where the parties come promptly, and have always intended to pay the claim, but through some accident or default have been prevented from doing so: *Patch v. Ward*, best reported in 16 W.R. 441; *Thornhill v. Manning*, 1 Sim. N.S. 451; *Brothers v. Lloyd*, 2 Ch. Ch. 119; *Miles v. Cameron* (1883), 9 P.R. 502; *Campbell v. Holyland*, 7 Ch. D. 172; *Nanny v. Edwards* (1827), 4 Russ. 124. *Trinity College v. Hill*, 2 O.R. 351, was reversed, 10 A.R. 99, not on the merits, but because the Court of Appeal thought the final order had not been actually obtained before the sale took place. In *Waddell v. McColl*, 2 Ch. Ch. 58, the judgment went on the ground that the defendant had been trying to get the money and had failed to do so, and there was a mistake in the Master's report. A mortgagee has an absolute title as soon as the final order is obtained: *Heath v. Pugh* (1881), 6 Q.B.D. 345; but in this respect that case would seem to conflict with *Campbell v. Holyland*. If ability to pay to the mortgagee all that is due him is the only test of the right to open the foreclosure, there is no finality in foreclosure proceedings; the real test should be the intention to redeem at the time the decree was made.

S. H. Blake, K.C., and *A. H. F. Lefroy*, for the Traders Bank. The concluding words of Rule 749 dispose of the contention that there was any disclaimer. So long as a mortgagee is in a position to open a foreclosure by suing on the covenants in his mortgage, a like power to open the foreclosure should be allowed to those who had a right to redeem: *Campbell v. Holy-*

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land, 7 Ch. D. 166; *Platt v. Ashbridge*, 12 Gr. at p. 107. This is a matter of practice and of discretion, and a multiplicity of appeals should not be encouraged: *Hulbert v. Cathcart*, [1896] A.C. 470, 476; *Dodge v. Smith* (1901), 1 O.L.R. 46.

H. C. Fowler, for the defendants *Brewer et ux.*

Gordon, in reply. The appeal is not on the ground that the Master and Judge in Chambers have improperly exercised their discretion, but on the ground that they have not applied to this case the principles of the authorities.

October 14. The judgment of the Court was delivered by FERGUSON, J.:—The evidence has been fully read and commented on by counsel and the authorities dealt with at large, and we are agreed in the view that no sufficient reasons appear for disturbing the order appealed from. We think the appeal should be dismissed with costs, but the costs may be set off in the usual way.

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[DIVISIONAL COURT.]

IN RE LIVINGSTONE ESTATE.

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Estate—Tenants in Common—Joint Tenants—Title by Prescription—Statute of Limitations—R.S.O. 1897, ch. 119, sec. 11.

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Sept. 17.

Where of five tenants in common of a farm, three acquired a title against the other two by virtue of the statute of limitations:—

Held, that the title acquired by the three tenants was a joint tenancy, and that they were thus tenants in common of their original three-fifths and joint tenants of the two-fifths.

THIS was an appeal by the heirs and heiresses (other than Mary Livingstone) of John Livingstone, deceased, from the judgment of MACMAHON, J., upon a motion under Rule 938.

Upon the argument counsel agreed upon the short statement of fact, that five heirs of Donald Livingstone, the father of the said John Livingstone, became each entitled as tenants in common to one undivided fifth of the land in question on the death of their father in 1858, two of whom never went into possession, and the other three acquired the undivided shares of these two by the statute of limitations; and asked for the decision of the Court whether the three acquired the shares of the two former as tenants in common or as joint tenants.

The facts are more fully stated in the judgment of MACMAHON, J.

The motion was heard before MACMAHON, J., in Chambers, at Ottawa, on Saturday, June 8th, 1901.

W. Wyld, for the Ontario Trust and Deposit Co.

George McLaurin, for the adult defendants other than Mary Livingstone.

Glyn Osler, for Mary Livingstone.

C. J. R. Bethune, for the infant child of Janet McDermid.

July 3. MACMAHON, J.:—Motion under Rule 938 on behalf of the Ontario Trust and Deposit Company, the administrators of the estate of said John Livingstone, to ascertain who

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are the parties entitled to share in the estate of the said deceased, and for the determination of the rights of such parties, and to settle the question arising in the administration of the estate, as to whether Mary Livingstone, deceased, is solely entitled to his estate or whether a portion thereof belongs to and forms part of the estate of the said John Livingstone.

Donald Livingstone, who died intestate in August, 1858, was at the time of his death the owner in fee in possession of the west half of lot No. 4 in the 7th concession of the township of Marlborough, valued at about \$4,000.

He left at the time of his death his son, the said John Livingstone, Ann McDermid, wife of Angus McDermid, Margaret Livingstone and Mary Livingstone, his only heir and heiresses at law him surviving; his wife and his only other child, a daughter, Janet, who became wife of Peter McDermid, having predeceased him.

At the time of the death of Donald Livingstone, his son John and his two daughters, Margaret and Mary, were living with him, and they remained continuously in possession of the said farm until the year 1887, when Margaret Livingstone died unmarried and intestate.

After the decease of Margaret, John and Mary continued in possession and resided on the said farm until December 20th, 1896, when John Livingstone died unmarried and intestate.

Mary Livingstone, after the death of her brother John, continued in possession of and resided upon the said farm until the sale thereof by the Ontario Trust and Deposit Company on December 7th, 1898.

Ann McDermid married in 1829, when she ceased to live on the farm. She died in 1869 leaving her surviving a number of sons and daughters, none of whom ever resided upon or were in any way in possession of the said farm. Some of these sons and daughters have since died, leaving children.

The daughter Janet was married to Peter McDermid in 1838 and died in 1840. She never from the date of her marriage resided upon or occupied the said farm; nor did her only child, Jessie, who became the wife of Adam Johnston, ever occupy or reside thereon.

At the death of Donald Livingstone, the ancestor, there were four surviving children, viz.: his son John and his daughters Margaret and Mary Livingstone, and Ann McDermid, and a grand-daughter Jessie Johnston, the daughter of Janet McDermid, who predeceased her father, Donald Livingstone.

There were thus five descendants of the ancestor who, under R.S.O. 1897, ch. 127, secs. 43 & 44, were entitled to share equally in the inheritance as tenants in common (sec. 56). So that as to the three children who on the death of their father remained in possession of the farm, viz.: John, Margaret and Mary, they were there having unity of possession, but a distinct and several title in each as to their undivided one-fifth shares.

Then as to the title to the remaining two-fifths, which on the death of Donald Livingstone in 1858 became vested in Ann McDermid and Jessie Johnston as tenants in common. There was in that year an ouster by John, Margaret and Mary Livingstone as to those two-fifths as there was "a usurpation of the right of seisin and possession and an exercise of such powers and privileges of ownership as to keep out or displace him to whom these rightly belong," and a "commencement of a new estate in the wrongdoer:" Bouvier's Dict. Title "Disseisin."

"An entry upon and a possession of the whole of the land by one tenant in common as if it had been his exclusive individual property, and the receipt by him of the rents and profits thereof . . . amounts to an actual ouster:" Knapp on Partition (ed. 1887) p. 87. See also Freeman on Cotenancy and Partition, sec. 242.

The 11th sec. of the Act respecting "The Law and Transfer of Property," R.S.O. 1897, ch. 119, has no application here, because it merely provides what the nature of the estate shall be where land is granted, conveyed, or devised, to two or more persons by letters patent, assurance, or will. In such cases the grantees or devisees take as tenants in common and not as joint tenants unless a contrary intention appears. The statute leaves untouched the case where an estate of joint tenancy has been created at common law.

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Where there is a disseisin, or wrongful entry by two persons, the effect of their entry is clearly and concisely stated by Lord Chancellor Hatherley in *Ward v. Ward* (1871), L.R. 6 Ch. at p. 791: "Now, suppose it had been a simple case of a farm wrongfully entered into by two persons, then, according to the passages cited from Coke upon Littleton (sec. 278, p. 181a), they would being disseisors enter as joint tenants and would acquire seisin as such."

The title of the disseisors, John, Margaret and Mary Livingstone, to the two-fifths shares had no foundation in right, so that the question upon which the judgment turned in *Brook v. Benness* (1898), 29 O.R. 468, does not arise here. There two persons had accepted a lease for five years from the owner of certain land. No rent was paid, and they remained in possession until the title was acquired by them. As lessees they held as tenants in common, and Mr. Justice Street held there was no disseisin by them but an unlawful holding over after the expiration of a lawful title, and that there was nothing to modify or alter the presumption of the continuance of the existing tenure, and that by lapse of time their tenancy in common for years ripened into a tenancy in common in fee.

Mr. Justice Street in that case drew a distinction as to the tenants remaining in possession after the expiration of their tenancy not constituting a disseisin—a distinction which was not recognized by Lord Hatherley in *Ward v. Ward*, for he says: "Here two persons are in lawful possession of a copyhold; the title under which they hold comes to an end, but they continue in possession and thus go on holding a certain share of the property without any title whatever. In what capacity do they hold on? It appears to me as joint tenants. . . . The two are joint tenants of the share so conveyed though they remain tenants in common as to their original share."

The last lines of the passage above cited refer to a well recognized rule of law that "the owners of an undivided share in land may be joint tenants as between themselves whilst as to the others they are tenants in common:" Williams on Real Property, 18th ed. p. 138.

I regard it as beyond question that the joint disseisin by John, Margaret and Mary Livingstone created a joint tenancy in them as to the two-fifths interest of Ann McDermid and Jessie Johnston.

Counsel for the different claimants to the estate agreed that upon the question being decided as to whether a tenancy in common or a joint tenancy was created in John, Margaret and Mary in the said two-fifths, the details as to the division could be worked out on the settlement of the order before the clerk of the Court.

Costs of all parties out of the estate. The plaintiff's costs as between solicitor and client.

The appeal was argued on September 11th, 1901, before a Divisional Court composed of BOYD, C., and FERGUSON, J.

W. H. Blake, for the appellants, contended that there was a distinction between the case of a tortious entry, and a case where there has been a rightful entry which has issued in a continued possession as here, and a title has been acquired by such possession: *Brock v. Benness*, 29 O.R. 468; *Armour on Real Property*, at p. 379*n*; R.S.O. ch. 133, s. 11; that a tenancy in common had been created by the statute: Co. Litt., secs. 233, 279, 292, 310, 311, and 322; *Harris v. Mudie* (1882), 7 A.R. 414, at p. 443.

Glyn Osler, for Mary Livingstone, contended that there was no rightful title in the two-fifths prior to the death of Donald Livingstone at which time the statute began to run; that there was no necessity for actual ouster: *Murphy v. Murphy* (1864), 15 Ir. C.L. 205; that the title to the two-fifths was not acquired by any of the methods of conveyance which rendered it a tenancy in common under the statute, R.S.O. 1897, ch. 119, sec. 11; and relied on *Ward v. Ward*, L.R. 6 Ch. 789.

September 17. The judgment of the Court was delivered by FERGUSON, J.:—This is an appeal from an order made by Mr. Justice MacMahon upon an originating notice. There were five tenants in common of a valuable farm. Three of these acquired a title against the other two by virtue of the statute of limitations and some of these three have since died. The

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farm has been converted into money of which a large sum is in hand and as to the division or distribution of this question has arisen.

We were told by counsel that they agreed upon all the questions but one, which is whether when the two-fifths of the estate were acquired by the three tenants in common who were in possession by reason of the statute having run against the two tenants not in possession and in favour of these three, the title so acquired was a joint tenancy or a tenancy in common. It was agreed between counsel that no statute is in force in Ontario which declares that titles taken under conveyances, wills, etc., are tenancies in common and not joint tenancies unless R.S.O. 1897, ch. 119, sec. 11, applies to the case. This being so I am of opinion that the two-fifths of the estate acquired as above by the three tenants in common who were in possession were taken by them in joint tenancy and not as tenants in common, and that the three in possession after having as above acquired by virtue of the statute the two-fifths were tenants in common of their original three-fifths and became and were joint tenants as to the two-fifths so acquired. There are, I think, unity of possession of interest of title and of time of commencement of title. At common law a conveyance of land to these three without words of severance would impart to them a joint tenancy, and I think the case analogous here as to the two-fifths acquired as above. I think the matter fairly illustrated by Lord Hatherley on the case *Ward v. Ward*, L.R. 6 Ch. 791, 792. I do not perceive the need for discussion such as took place at the bar in regard to disseisin or wrongful acts.

I am of the opinion that the order or judgment appealed from should be affirmed and this appeal dismissed with costs.

A. H. F. L.

[DIVISIONAL COURT.]

GREENLEES V. THE PICTON PUBLIC SCHOOL BOARD.

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Sept. 17.

Public School—School Board—Notice of Meeting—Termination of Contract with School Teacher—Action for Salary—Jurisdiction of Division Court.

An agreement between school trustees and the plaintiff, as teacher, gave either party a right to terminate it on one month's notice. The former notified the plaintiff of its termination pursuant to a resolution passed at a board meeting, notice of which, however, had not stated that this matter would be considered, of which some of the trustees were unaware, and two of them did not attend:—

Held, that this was not a proper exercise of the option to terminate, and had not that effect.

The plaintiff brought this action in the division court, claiming a balance of salary, and had recovered judgment for \$132.03:—

Held, that the matters of difference between the parties fell within R.S.O. 1897, ch. 292, sec. 77, sub-sec. 7, and the division court had jurisdiction.

THIS was an appeal to the Divisional Court by the defendants from the decision of the Judge of the first division court of the county of Prince Edward, of July 26th, 1901, whereby he dismissed the defendants' application for a new trial in this action and refused to set aside the judgment given by him in favour of the plaintiff on July 4th, 1901, for \$132.03 and costs. The plaintiff's claim was for the above sum, as the balance of salary due to him as a teacher, by the defendants on June 1st, 1901, under the agreement between himself and the defendants, dated December 18th, 1900. The fourth condition of this agreement, referred to in the judgment of this Court, was as follows:—

"The trustees or school board and the teacher may at their option terminate this engagement by giving notice in writing to the other of them at least one calendar month previously and so as to terminate on the last day of a calendar month."

The agreement was for a term of one year, at a yearly salary of \$800, ending on December 31st, 1901, and provided for the payment of the salary to the plaintiff monthly. The notice given to the members of the board for the meeting of February 19th, also referred to in the judgment, ran as follows:—

"You are requested to attend a special meeting of the public school board, in the school house, on Tuesday evening, the 19th inst., at seven o'clock, for general special business."

The remaining facts are stated in the judgment.

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The appeal was argued on September 10th, 1901, before
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J. B. Clarke, K.C., for the defendants, contended that the notice was sufficient, as the school in question was an urban school to which the requirements of R.S.O. 1897, ch. 292, sec. 18, sub-sec. 4 and secs. 19 and 62, as to the notice to be given for meetings of the board in the case of rural schools did not apply; that the plaintiff had no right to sue for unpaid salary after dismissal: *Boston Deep Sea Fishing and Ice Company v. Ansell* (1888), 39 Ch. D. 339, at pp. 352-3; *Smith's Law of Master and Servant*, 4th ed., pp. 93-4.

M. R. Allison, for the plaintiff, contended that there was a concealment by some of the board of the important matter coming up for discussion, and an attempt to carry it by surprise, and that all the trustees were entitled to proper notice: *Hands v. Law Society of Upper Canada* (1888-90), 17 O.R. 300, 17 A.R. 41; *Re Jones and City of London* (1890), 30 O.R. 583; *Dillon on the Law of Municipal Corporations*, 4th ed., sec. 264; that the division court had jurisdiction to entertain these actions: R.S.O. 1897, ch. 292, sec. 77 (7): *The Municipality of the County of Cape Breton v. McKay* (1891), 18 S.C.R. 639.

Clarke, in reply, contended that R.S.O. 1897, ch. 297, sec. 77, did not apply to the case of alleged wrongful dismissal, and referred to *Lilley v. Elwin* (1848), 11 Q.B., at p. 754.

September 17, 1901. The judgment of the Court was delivered by FERGUSON, J.:—An appeal by the defendants from the judgment of the first division court of the county of Prince Edward.

There were eight members of the school board. The notice of the meeting of the board on Tuesday, February 19th, for general special business did not inform the members to whom it was given that the matter of determining the contract by which the plaintiff was employed was to be considered, and some of the members had no knowledge of this, while others of them had. It is not asserted or pretended that the plaintiff had any notice or knowledge of the meeting. The board consisted of eight members; only six of these attended the meeting. At this

meeting a resolution was professedly passed instructing the secretary of the board to notify the plaintiff in writing under the corporate seal of the board that the contract between the plaintiff and the board should cease and determine on the 31st of the following March. Four of the members present at the meeting voted for the resolution and two of them against it. The secretary accordingly gave the plaintiff the notice. In pursuance of this proceeding another teacher was employed in the room of the plaintiff, and at the expiration of the period mentioned in the resolution the board, through certain of the members thereof, prevented the plaintiff from continuing to teach and earn his salary. If reasonable notice had been given informing the members of the board that it was intended to consider this matter at the meeting (though it may be said that this is not in words required by the statute, as in some other cases), it can, I think, from all that appears, scarcely be doubted that all would have been present, and probably the conclusion would have been entirely different. As it was, some of the members had the knowledge and some had not. The employment of the plaintiff was for one year at a salary of \$800. This year commenced on the 3rd day of January, 1901, and was to end on the 31st day of December of the same year; and the agreement contained a provision as to its continuing from year to year unless and until terminated by a notice provided for by the fourth condition of the conditions to which the contract was made subject.

I can arrive at no conclusion but that what was done by this so-called resolution of the defendants, and the notice to the plaintiff in pursuance of it, cannot be considered a fair or proper exercise of the power and option mentioned and referred to in the fourth condition to which the agreement of hiring was made subject. The agreement was not, as I think, terminated by these acts as was contended on behalf of the defendants.

It was contended that in the event of its being held that the resolution and notice to the plaintiff had not the effect of determining the employment, then the division court had no jurisdiction, for in such case the action would necessarily be for a wrongful dismissal, and the amount of the claim and judgment is \$132.03.

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The action was brought claiming a balance of salary, and, in all the circumstances appearing, I am of the opinion that the matters of difference between the parties fall under the provisions of secs. 77, sub-sec. 7, of R.S.O. 1897, ch. 292, and that the division court had jurisdiction. I cannot see that the learned Judge in the Court below has gone wrong, and I think this appeal should be dismissed with costs.

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THE NELSON COKE AND GAS CO. v. PELLATT.

Aug. 10.

Company — Subscription for Stock — Necessity for Allotment — Calls — British Columbia Companies Act, R.S.B.C. ch. 44, sec. 30 — Ontario Companies Act, R.S.O. 1897, ch. 191.

On September 1st, 1899, the defendant subscribed for shares in the plaintiff company by agreement covenanting with the company and directors to accept the same when allotted, and pay as calls might be made. The company was incorporated under the British Columbia Companies Act, 1897, which so far as affected this case is identical with the English Companies Act, 1862. On December 14th, 1899, the directors resolved that all shares should be called up, and between that date and November 22nd, 1900, many interviews took place between the president and the secretary-treasurer and the defendant, at which the latter's liability was discussed and demand for payment made, which also was demanded in several letters written by them to the defendant, but to which the defendant made no reply. On November 15th, 1900, the defendant wrote formally withdrawing his "offer" to take shares. In reply, the treasurer on November 22nd, 1900, again notified him for immediate payment, and on November 29th, 1900, the directors passed by-laws for the issue and allotment of shares to the defendant to the number subscribed for, and also that the whole should be at once called up:—

Held, that the defendant was not liable on his shares, having withdrawn his subscription before allotment.

THIS was an action brought to recover the amount alleged to be due from the defendant in respect to a subscription by him for shares in the plaintiff company under the circumstances set out in the judgment.

The action was tried before LOUNT, J., at Toronto, on April 26th, 1901.

G. H. Watson, K.C., and S. C. Smoke, for the plaintiffs, cited *Bolton Partners v. Lambert* (1888), 41 Ch. D. 295; *In re*

Portuguese Consolidated Copper Mines (1890), 45 Ch. D. 16; *In re Queen City Refining Co. of Toronto* (1885), 10 O.R. 264; *Re Zoological and Acclimatisation Society of Ontario* (1889), 17 O.R. 331; *In re London Speaker Printing Co.* (1889), 16 A.R. 508; *In re Haggert Bros. Manufacturing Co.* (1892), 19 A.R. 582.

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H. J. Scott, K.C., and *H. H. Macrae*, for the defendant, contended that the English cases governed and not those of Ontario, because the British Columbia Companies Act, 1897, R.S.B.C., ch. 44, was similar to the English Companies Act and not to the Ontario Companies Act, R.S.O. 1897, ch. 191, and referred especially to sec. 23 of the English Companies Act, 1862, 25-26 Vict. ch. 89, and to sec. 30 of R.S.B.C. ch. 44. They also cited *In re Richmond Hill Hotel Company*, *Pellatt's Case* (1867), L.R. 2 Ch. 527; *In re United Ports Company*, *Adams' Case* (1872), L.R. 13 Eq. 474; *In re The United Ports and General Insurance Co.*, *Tucker's Case* (1871), 41 L.J. Ch. 157; *Lindley's Company Law*, 5th ed., p. 13; *Buckley's Companies Acts*, 7th ed., notes to sec. 23, p. 50 *et seq.*; *Palmer's Company Precedents*, 6th ed., p. 70; *Brice on Ultra Vires*, 3rd ed., p. 284; R.S.B.C. ch. 44, secs. 4, 36, and Table A, sec. 36.

Watson, in reply.

August 10. LOUNT, J.:—The plaintiff company are an incorporated joint stock company formed under the provisions of The Companies Act, 1897, of the Province of British Columbia, and the individual plaintiffs were the applicants for the charter of the company, and are now the directors. This action is brought by the individual plaintiffs to enforce payment by the defendant of \$10,000, alleged to be due and payable to them on the following agreement:—

“The Nelson Coke and Gas Company, Limited.

“Application having been made by W. H. Pearson, W. H. Pearson, Jr., P. E. Doolittle, L. L. Merrifield, and E. C. Arthur, under the provisions of The Companies Act, 1897, of the Province of British Columbia, for a charter or letters patent of incorporation of a joint stock company under the

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name of "The Nelson Coke and Gas Company, Limited," having an authorized capital of two hundred and fifty thousand dollars, divided into ten thousand shares of twenty-five dollars each, of which the directors are to have power to issue not more than three thousand shares, or seventy-five thousand dollars, as preference shares bearing a preferential dividend at and limited to seven per cent. per annum, cumulative, and having the right in a winding up to repayment of capital in priority to the ordinary shares.

"We, the undersigned, do hereby severally subscribe for and agree to take the respective amounts of the capital stock of the said company and of the class thereof set opposite our respective names as hereunder and hereinafter written, and to become shareholders in such company to the said amounts, when and as the said stock so subscribed for by us severally shall be issued and allotted to us, after the incorporation of the said company, and we do hereby severally covenant each with the other and others, and with the said W. H. Pearson, W. H. Pearson, Jr., P. E. Doolittle, L. L. Merrifield, and E. C. Arthur, and each of them and with the said company (when incorporated) and the directors thereof to accept the said stock when the same shall be allotted to us severally, and to pay for the same to the said company at par when and as a call or calls for payment shall be made upon us severally by the directors.

"In witness whereof we have set our hands and seals respectively this first day of September, 1899."

It is contended by them that under this agreement the defendant is indebted upon his covenant to pay for 200 preferred shares at \$25 per share—\$5,000; and for 200 common or ordinary shares at \$25 per share—\$5,000.

The plaintiff company and the directors also are joined in the action to enforce payment by the defendant of \$10,000 alleged to be due and payable to them on the following agreement:—

"The Nelson Coke and Gas Company, Limited.

Capital, \$250,000.	Shares, \$25 each.
Preference Stock, 7 per cent., cumulative,	\$75,000.
Common Stock.....	\$175,000.

"We, the undersigned, do hereby severally subscribe for, and agree to take, the respective amounts of the capital stock of the Nelson Coke and Gas Company, Limited, and of the class thereof set opposite to our respective names as hereunder and hereinafter written, and to become shareholders in said company to the said amounts, when, and as the said stock so subscribed for by us severally, shall be issued and allotted to us; and we do hereby severally covenant, each with the other and others, with the said company and the directors thereof, to accept the said stock when the same shall be allotted to us, severally, and to pay for the same to the said company at par, when and as a call or calls for payment shall be made upon us severally by the directors.

"In witness whereof we have set our hands and seals this first day of September, 1899."

And it is contended by them that under this agreement the defendant is indebted upon his covenant to pay for 200 preferred shares at \$25 per share—\$5,000; and for 200 common or ordinary shares at \$25 per share—\$5,000. It is admitted that the shares sued for by the individual plaintiffs and by the plaintiff company and the directors are the same shares, and the plaintiffs are only entitled—if the defendant is liable at all—to recover for the one sum, \$10,000, but the plaintiffs say both agreements are alive and operative, and that they can recover under either or both. They also say that these shares were duly allotted to the defendant, notice of allotment was duly given to him, and the shares were duly called in, and thereby he became liable.

The defendant denies all liability and contends that the first agreement was a provisional one, and was completed and satisfied by the execution of the second agreement, which is an application to take stock subject to the terms thereof, and that the company did not accept his application, and did not within a reasonable time allot the stock to him and did not give notice of allotment, and thereby he became released from any liability to take the stock or pay calls thereon. He further says the stock not having been allotted to him within a reasonable time, he withdrew his application and subscription

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therefor and duly notified the plaintiffs. He denies that the company have made any call or calls upon him for payment of stock, and no money is due thereunder, and he denies making any contract with the individual plaintiffs.

Both agreements are dated September 1st, 1899. From the evidence I find the first agreement was executed by the defendant between the 1st and 4th of September, 1899, and it was not, as stated therein, that an application was then being made for the charter, as in fact the charter had been granted incorporating the company on the 26th of August previous. The individual plaintiffs were not therefore in a position to make an agreement by which the defendant could be made liable to them individually or to the company; and I further find that the second agreement was executed subsequently to the execution of the first, and was in substitution therefor, and that the first agreement was completed and satisfied by the execution of the second, and I find there is no liability on the part of the defendant to the plaintiffs as individuals or to the company thereunder.

The second agreement is written in what is called a "stock subscription book," and on its true construction is an application for shares in the company: *Nasmith v. Manning* (1880), 5 A.R. 126; *Re London Speaker Printing Co.*, 16 A.R. 508, and many other cases where agreements of a similar character, with covenants of the same kind, have been held to be applications for shares. This being the case, what is requisite to make it a binding contract between the parties? Under the English authorities—to be found fully collected in Buckley's Companies' Act, 7th ed., and Lindley's Law of Companies, 5th ed.—when there is an application made for shares, which is usually made by letter, it is held that to the application there must be a response by allotment of the shares applied for, and notice thereof given to the defendant before he can be held liable. That is, there must be a completed contract made out by offer, acceptance by allotment, and notice thereof to the defendants.

I am of the opinion that such a contract has not been established in this case. No allotment of shares was made by the company to the defendant until after the defendant had withdrawn his application to take shares; which under the

authorities, in my opinion, he had a right to do at any time before an allotment was made and he was notified thereof, and in withdrawing he put an end to and terminated the agreement which had up to this time existed between them.

The company is incorporated under the British Columbia Companies Act, 1897, R.S.B.C. ch. 44, which is identical in the provisions affecting this case with the English Companies Act, 1862, 25-26 Vict. ch. 89, and I therefore rely more upon the decisions under the English Act than I do upon those under the Joint Stock Companies Act of this Province, R.S.O. 1897, ch. 191, where I find the provisions applicable to this case differing.

By the agreement the defendant subscribed for and agreed to take stock and become a shareholder when and as the stock should be issued and allotted to him, and he covenanted to accept the stock when it should be allotted to him, and to pay for it when a call should be made upon him by the directors. Now, until the condition precedent on the part of the company of issuing and allotting stock to the defendant and of notifying him thereof has taken place, he does not become a shareholder. The definition of a shareholder under the Act of British Columbia, sec. 30 (the same as sec. 23 of the English Act), is: "The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon registration of the company shall be entered as members on the register of members hereinafter mentioned, and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company."

The defendant is not a subscriber of the memorandum of association, and cannot therefore be said to be a member of the company. He is not nor has he at any time been a director of the company, and has not attended or taken part in the meetings or proceedings of the board of directors, which under some authorities has been held to be, under the facts and circumstances of the particular cases, sufficient to create a liability.

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The question then is, does the defendant come under the other class, "every other person who has agreed to become a member," etc.? Whether a person, other than a subscriber of the memorandum of association or director, has agreed to become a member will turn upon the facts. As I have already stated, to constitute a binding contract to take shares between the company and the defendant, one of the general public, it must be established that the application for shares was followed by an allotment of shares, and that the allotment was communicated to the defendant. In *Pellatt's Case* (1867), L.R. 2 Ch. 527, Cairns, L.J., said, at p. 535: "I think that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract."

See also *Hebb's Case* (1867), L.R. 4 Eq. 9; *Gunn's Case* (1867), L.R. 3 Ch. 40; Buckley's Companies Act, 7th ed., at p. 64; Lindley's Law of Companies, 5th ed., p. 14 *et seq.*; *Nasmith v. Manning*, 5 A.R. 126, 5 S.C.R. 417.

An application for shares may be withdrawn at any time before the shares have been allotted: *Ramsgate Victoria Hotel Co. v. Montefiore* (1866), L.R. 1 Ex. 109; *Ritso's Case* (1876), 4 Ch. D. 774; or before the allotment is communicated to the applicant or while the contract is still *in fieri*: *Pentelow's Case* (1869), 4 Ch. 178; *Hebb's Case*, L.R. 4 Eq. 9.

Sec. 36 of the British Columbia Act (sec. 25 of the English Act), provides: "Every company shall cause to be kept in one or more books a register of its members, and there shall be entered therein" certain information set out in the section.

The facts, as I find them in this case, are that Dr. Doolittle, who was taking an active interest in the company, had been one of the chief promoters, and had been in British Columbia procuring the charter, met the defendant on his return therefrom at the town of Nelson, in British Columbia, and subsequently they travelled on the train returning to Ontario. While on the train Dr. Doolittle introduced the subject of this company, and discussed with the defendant the prospects of the company. The defendant then expressed his willingness to take stock. After their return to Toronto, and about September 1st, 1899, the defendant signed the first agreement (Ex. 1), named

on its back "stock book," but which is, as I have already said, an application for shares.

Two names precede the defendant's in this agreement—George Gooderham and T. G. Blackstock. After the execution of this agreement by the defendant, the defendant, who was intending to take, and did take, a part in procuring other subscribers, deemed it advisable that a stock subscription book should be got up, as being more likely to induce persons to subscribe. This was acquiesced in by Mr. Pearson, senior, the president, and Mr. Pearson, junior, the secretary-treasurer of the company. For this purpose the second agreement (Ex. 2) was procured and signed by the defendant as well as by George Gooderham, T. G. Blackstock, and many others who became subscribers. It will be observed that the names of "Gooderham" and "Blackstock" are crossed out of Ex. 1, though the name of the defendant is not. I think this was a mere oversight, and I am of the opinion it was intended at the time the defendant signed Ex. 2 that his name should also have been struck out; it was not intended or expected that the defendant should any longer be liable thereunder, but it was intended and understood by the parties that any agreement which had up to that time existed between the defendant and the individual plaintiffs was to be determined and put an end to, and I find as a fact that the first agreement (Ex. 1) was put an end to and determined at the time the second agreement (Ex. 2) was executed by the defendant.

The minute book of the company is produced. It will be seen that until October 4th, 1899, no meeting of the directors had been held; on that day the officers were appointed and some other matters attended to. Another meeting of the directors was held on November 10th, 1899. No action was taken as to the stock or the allotting of same. On December 14th, 1899, there was a meeting of the directors at which the following resolution was passed: "That the subscribers for preferred stock of this company be called up in full and that the treasurer notify all subscribers to pay the amount of their subscription on or before January 18th, 1900." After this the directors met on January 5th, January 30th, February 5th, March 13th, and November 13th, 1900. No action was taken at any of these meet-

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ings regarding the stock or the allotting of same, but between December 14th, 1899, and November 22nd, 1900, many interviews took place between Mr. Pearson, sr., and Mr. Pearson, jr., and the defendant, and on all occasions the matter discussed was the liability of the defendant for the stock subscribed for under the second agreement; demands for payment were made upon the defendant, and assurances were given by him from time to time that he would pay, he assigning as a reason for not paying that owing to the stringent condition of the money market and having a great deal of money locked up, he was not then in a position to pay, and, as stated by Mr. Pearson, jr., in his evidence, he was "putting off" but not objecting to pay; during this time, also, several letters were written and sent by Mr. Pearson, sr., and Mr. Pearson, jr., to the defendant demanding payment of this amount (\$10,000), alleged to be due on his subscription for stock. To all of these letters the defendant sent no reply, and, as he says in his evidence, he paid no attention to them—threw them aside when received. The first letter sent to him is dated December 26th, twelve days after this resolution of December 14th. This letter notifies him that the directors have made a call upon the preference shareholders for the whole amount of the stock subscribed by them, and that the amount is to be paid on January 18th to the treasurer, Mr. Pearson, jr., naming the amount of preference stock as 100 shares, and the amount payable thereon \$2,500. A similar letter to this, and on the same day, was sent demanding payment for the 100 preference shares subscribed for by the defendant (in trust).

The next are two letters, one of them in trust, dated March 21st, from the treasurer to the defendant, stating that the directors had called up the common stock, that it was payable on April 12th, naming the number of shares 100, and the amount payable \$2,500. Then three letters were sent to him after this, in May, all demanding payment. It was during this time that some of the interviews before referred to took place.

On November 3rd, 1900, Mr. Pearson, sr., as president, wrote the defendant, stating that the stock subscribed by him, \$10,000, had been duly called up, and demanding payment, saying it must be paid, and that his instructions were peremptory.

The defendant on November 15th, 1900, wrote to the secretary-treasurer, Mr. Pearson, jr.: "*Re Nelson Coke & Gas Co.* I desire hereby to formally withdraw the offer which I made in the subscription book to take certain shares of the capital stock in your company. I am obliged to take this position because, as has always been known to you, I have not been able to carry out the plans which I had made to float the stock. I have sent you another communication by the same mail which will explain fully my position in this matter."

By the same mail the defendant wrote the secretary-treasurer more fully, explaining why he had failed to take the stock, and making an offer to accept the stock which he had personally subscribed for, but declining to accept the stock which he said he had taken in trust. This offer was made without prejudice. The directors called a meeting on November 22nd, 1900, and passed this resolution: "President read three letters from Mr. H. M. Pellatt, two dated the 15th inst., addressed to the treasurer, and one dated the 20th inst., addressed to Dr. Doc-little. After considering the same it was moved, etc., and resolved that the directors hereby decline to assent to Mr. H. M. Pellatt's request to withdraw his subscription for 400 shares of the capital stock of this company." And the treasurer was instructed to notify the defendant for immediate payment of full amount of stock subscribed for by him.

Notification of this resolution was sent by the secretary-treasurer to the defendant on November 23rd, and he replied by his solicitor on November 27th as follows: "Mr. H. M. Pellatt instructs me to say to you on his behalf, in reply to your letter to him of the 23rd inst., that in view of the action taken by your directors in refusing to accept the proposition of settlement which he made, he feels justified in declining to accept any of the stock in your company which he offered to take. Mr. Pellatt therefore adheres to his notice of November 15th, 1900, withdrawing his offer to take any shares of the capital stock of your company."

On November 28th the company, through their solicitors, wrote to the defendant demanding payment for the stock subscribed for by him, and threatening legal proceedings if not paid. In this letter the solicitors do not indicate in any way

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that an allotment of stock had been made, but seemed to rely on the liability as one arising entirely out of the agreement, and I think that up to this date it had not occurred to the directors that there was any duty on their part to allot stock, they being under the impression that the resolution of December 14th, calling up the stock and notifying all subscribers to pay, was all that was in law required of them to create a liability on the defendant's part.

On the following day, November 29th, the following by-laws were passed :

"By-law No. 5. It is hereby resolved and enacted as a by-law of the Nelson Coke and Gas Co., Limited, that 3,000 shares of preferred stock and 7,000 shares of ordinary or common stock of the said company of \$25 each respectively, be and the same are hereby issued."

"By-law No. 6. It is hereby resolved and enacted as a by-law of the Nelson Coke and Gas Co., Limited, that out of the preferred shares and ordinary or common shares of the stock of this company already issued there be allotted to the persons hereinafter named the number of shares of preferred stock and the number of shares of common stock set opposite to their names respectively, such shares being for \$25 each."

	Preferred Shares.	Ordinary Shares.
H. M. Pellatt (in trust)	100	100
H. M. Pellatt	100	100

The names of several other shareholders also appear.

"By-law No. 7. It is hereby resolved and enacted as a by-law of the Nelson Coke and Gas Co., Limited, that the whole amount of preference shares and the ordinary shares or common shares issued and allotted be and the same is hereby called up and made payable forthwith to the company by the subscribers therefor and the said shareholders respectively."

"By-laws Nos. 5, 6 and 7 were read once, twice and three times and passed."

"Moved, etc., that the treasurer be directed to notify Mr. H. M. Pellatt that the whole of his preferred shares and ordinary shares subscribed for by him and allotted to him have been called up and made payable forthwith, and that Mr.

Pellatt be requested to send the company his cheque for the amount of such shares subscribed for by him, namely, two hundred preferred shares, \$5,000, 200 ordinary or common shares, \$5,000." This is the last entry or minute in the book.

As appears from the minute book, up to November 29th, 1900, there had not been any issue of the stock or allotment thereof, unless the resolution of December 14th, 1899, and notices given and sent to the defendant, orally and in writing, can be treated as an issue and allotment of shares to him. From the best consideration I have been able to give the matter, and upon the authorities governing, I cannot so hold. I think the resolution of the 14th December cannot be looked upon as an allotment, and if not, then all the demands made upon the defendant, based upon the resolution, cannot convert that which was not an allotment into one. Nothing appears in the company's books to show an allotment other than the by-law of November 29th. No register was kept as required by sec. 44 of the British Columbia Act, and although this is not absolutely necessary to establish allotment, yet it is some evidence that none had been made. A book is produced, called a "stock ledger," in which entries are made, which might be called a register if the requirements of the section had been sufficiently complied with. Such, however, is not the case, and I find it is not a register as defined by the Act. I am, moreover, of the opinion that this book had no existence at the time the by-laws were passed. All entries are in the same handwriting; all appear as if written at the same time. Mr. Pearson, sr., the president, said he only knew of one book kept by the company, the minute book. Mr. Pearson, jr., the secretary-treasurer, gave, I thought, a lame account of it, or when it came into existence, and no person gave evidence of its existence prior to the passing of the by-laws, and I find it was prepared and written up after the passing of the by-laws, though I do not wish it to be understood that in so finding I desire to convey the meaning that it was prepared for any improper purpose.

Now, the evidence of an allotment of the stock of this company is made plain by the minute book, by by-laws 5, 6 and 7, and it does not appear in this book there was any issue or allotment of stock or notice of allotment until Novem-

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ber 29th. By the passage of these by-laws the company in effect admit that up to this date none had been issued or allotted. If an earlier allotment had taken place, what occasion was there for the by-laws issuing and allotting stock the second time, the same stock to the same parties? I am obliged to come to the conclusion and I find that until November 29th there had not been any issue or allotment of stock to the defendant, and as he had on November 15th withdrawn his application for shares, and subsequently on November 27th through his solicitors confirmed such withdrawal, which under the authorities he had a right to do—see Buckley's Companies Act, 7th ed., and Lindley, Law of Companies, 5th ed.—he is not in my opinion a shareholder and is not liable in this action. It was strongly urged upon me by plaintiffs' counsel that the by-laws related back and operated from the date of the resolution of December 15th, and I am referred to the case of *Bolton Partners v. Lambert*, 41 Ch. D. 295, and to *In re Portuguese Copper Mines*, 45 Ch. D. 16, as authorities to support this contention. In my opinion the facts and circumstances are entirely different and distinguishable, and I am unable, therefore, to give any effect to the argument.

I dismiss the action with costs.

A. H. F. L.

ATTORNEY-GENERAL FOR ONTARIO V. STUART.

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Oct. 18.

Revenue—Succession Duties—Double Duty—Power of Appointment—Statutes.

The testator died in England on the 25th February, 1901, possessed of and entitled to lands in Ontario. He left a will and four codicils by which his sister was named as sole executrix and trustee, and was bequeathed the income of his whole estate for life and given a general power of appointment by will in respect of the whole estate. The sister died on the 2nd March, 1901, without having proved the will and codicils and without having taken upon herself any of the burdens thereof. By her will, made in 1873, she gave all her estate to the defendant, who obtained from the High Court of Justice in England letters of administration to the estates of the testator and his sister with the wills annexed. He then applied to a surrogate court in Ontario for ancillary letters of administration to both estates and for legal authority to deal with the lands in Ontario:—

Held, that, having regard to the provisions of cl. (g) of sec. 4 of the Succession Duty Act, R.S.O. 1897, ch. 24 (inserted by sec. 11 of 62 Vict. (2) ch. 9), the lands in Ontario were subject to two duties, as having devolved under both wills.

Held, also, that the provisions of sub-sec. 2 of sec. 6 of 1 Edw. VII. ch. 8 (O.) were not declaratory of the previous law nor retroactive, and, having become law since the two deaths, did not apply to this case.

Attorney-General v. Theobald (1890), 24 Q.B.D. 557, distinguished.

SPECIAL CASE stated for the opinion of the Court in an action by the Attorney-General for Ontario against Sir Edward Andrew Stuart, Baronet, of London, England, to determine whether a double succession duty was payable upon property in this Province in respect of which the defendant was applying for ancillary grants of administration with the will annexed. Sir Charles James Stuart, the brother of the defendant and his predecessor in the baronetcy, died on the 25th February, 1901, leaving a will and four codicils. The bulk of his estate was in England, where he was domiciled, and amounted to £64,000. The property in Ontario was land valued at \$51,475. The testator's will was dated the 6th January, 1875, and left the whole of his residuary estate to executors and trustees, with a direction to pay his brother, the defendant, the income for life. By the third codicil, dated the 3rd January, 1890, he directed that the trustees should pay the whole income to his sister Mary Catharine Stuart during her life, and gave her a general power of appointment to dispose of his estate by will, and directed that in default of appointment, the provisions of the original will should take effect. By the last codicil, dated the 17th July, 1895, he made his sister the sole executrix and trustee under

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the will and codicils. She died five days after the testator, and left a will, dated the 2nd September, 1873, by which she gave all her estate to Sir Charles, and in case of his death without issue before her (which was the event that happened), she gave it to the defendant. The will of Sir Charles was not proved before her death, and in England the defendant obtained letters of administration to the estates of both his brother and sister with the wills annexed. The letters in respect of the estate of Sir Charles were issued to the defendant as the appointee of his sister.

The case was heard by FERGUSON, J., in the Weekly Court, on the 18th September, 1901.

Shepley, K.C., and *F. C. Jones*, for the plaintiff. There was one devolution of the estate upon the death of Sir Charles, and a second upon the death of his sister. There was a devolution whether or not she exercised the power of appointment. Section 2 of the Succession Duty Act, R.S.O. 1897, ch. 24, defines "property;" sub-sec. 1 (a) of sec. 4 is the operative section; and sub-sec. (g) is added by 62 Vict. (2) ch. 9, sec. 11; and these make subject to duty any property of which a person dying was competent to dispose, expressly including a power of appointment by will. If the power existed, but was not exercised, there would still be a devolution on the death of the person having the power: Finance Act (Imp.), 1894, 57 & 58 Vict. ch. 30, sec. 2, sub-sec. 1 (a); sec. 22, sub-sec. 2 (a); Hanson on Death Duties, 4th ed., p. 97; Soward on Estate Duties, 4th ed., p. 43; Freeth on Death Duties, 3rd ed., pp. 98-100. There was a devolution whether the power was exercised or not; but, at all events, the power was exercised, notwithstanding that the sister's will was made before the power was hers: *Boyes v. Cook* (1880), 14 Ch. D. 53. Clause (g) was amended in 1901 by 1 Edw. VII. ch 8, but that was after the two deaths, and it is not retroactive.

G. T. Copeland, for the defendant. We admit that there was a valid exercise of the power of appointment by Mary Catharine Stuart. But we contend that the Act of 1901 does apply, because it is declaratory of the previous law. The words "be deemed" shew that that is the case. On the question of

the construction of the statute, I refer to *Attorney-General v. Theobald* (1890), 24 Q.B.D. 557; *McEvoy v. Clune* (1874), 21 Gr. 515; *Jones v. Bennett* (1891), 63 L.T. 705; and on the general question to Hanson on Death Duties, 4th ed., p. 598.

J. D. Falconbridge, on the same side. The Act of 1901 is in the nature of an Interpretation Act, construing the words "competent to dispose" contained in the Act of 1899, and the later Act was, therefore, not an amendment, but a declaration of the meaning of the former Act, and *Attorney-General v. Theobald* is on this ground indistinguishable. Apart altogether from the Acts of 1899 and 1901, the law was, as it is declared to be by the Act of 1901, that the donee of a power takes from the donor of the power, and not from the appointor: *Attorney-General v. Parker* (1898), 31 N.S. Reps. 202; *Tatnall v. Hankey* (1838), 2 Moo. P.C. 342; *Middleton v. Crofts* (1736), 2 Atk. 650, 668; *Commissioners of Inland Revenue v. Priestley*, [1901] A.C. 208. That is an additional reason for construing the Act of 1901 as declaratory. *Attorney-General v. Cameron* (1896), 27 O.R. 380, shews the theory of the Act.

Shepley, in reply. The Interpretation Act, R.S.O. 1897, ch. 1, sec. 8, cl. 55, is expressly against the contention of the defendant.

October 18. FERGUSON, J.:—Special case. The differences between the parties have regard to succession duties. The material facts are, I think, all clearly and sufficiently set forth in the case stated. Sir Charles James Stuart, in his lifetime of Eaton square, in the county of Middlesex, England, died without issue on the 25th day of February, 1901, having published his last will and testament with four codicils thereto. At the time of his death he was possessed of and entitled to certain lands in the Province of Ontario, amounting in value to the sum of \$51,475. His sister, Mary Catharine Stuart who was the sole executrix and trustee under the said will and codicils, died on the 2nd day of March, 1901, without having proved the will and codicils and without having taken upon herself any of the burdens thereof. Sir Edward Andrew Stuart, a brother of the testator, applied to His Majesty's High Court in England for and obtained letters

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of administration with the said will and codicils annexed. There was a large estate of the testator in England, in respect of which succession duty was paid, regardless of the estate in this Province. This fact is stated with particularity in the case—a fact, however, that does not seem to me of much, if any, importance here.

By the third codicil to the will the testator declared that his trustee or trustees should, after making a deduction of £2 per centum, pay the whole of the income of his residuary real and personal estate, whatsoever and wheresoever, and of the investments for the time being representing the same, to his said sister Mary Catharine Stuart during her life, and that from and after her death they should stand possessed of the said residuary real and personal estate, and the investments for the time being representing the same, upon trust for such person or persons, in such shares, and generally in such manner, as his said sister Mary Catharine Stuart should by will or codicil appoint, and, in default of such appointment, and so far as no such appointment should extend, then upon and for the trusts and purposes and with and subject to the powers and provisions in the will contained.

By the fourth codicil the testator revoked the appointment of the executors and trustees contained in the will, and appointed his said sister Mary Catharine Stuart sole executrix and trustee in their place.

The said Mary Catharine Stuart had in the year 1873 made her last will, whereby she gave, devised, and bequeathed all her real and personal estate, whatsoever and wheresoever, unto her brother Sir Charles James Stuart to and for his own use absolutely, his heirs and assigns, forever, and, in case of his death without issue before her death, she gave and bequeathed all her real and personal property or estate to her brother Edward Andrew Stuart (who is the above-named defendant), his heirs and assigns, forever; and, as appears above, the said Sir Charles James Stuart did die without issue before the death of the said Mary Catharine Stuart.

It was not disputed on the argument of the case that under the provisions of the will of Sir Charles James Stuart and the codicils thereto the said Mary Catharine Stuart took and had at

the time of her death a general power of appointment by will in respect of the aforesaid lands in this Province which had been the property of her brother Sir Charles James Stuart, nor was it disputed that her will (though executed in 1873, yet speaking at and from the time of her death) was a good and sufficient exercise of the power of appointment in favour of the above-named defendant, Sir Edward Andrew Stuart: *Boyes v. Cook*, 14 Ch. D. 53; *Airey v. Bower* (1887), 12 App. Cas. 263. This defendant, Sir Edward Andrew Stuart, had applied also to the proper Court in England for and obtained administration with the will annexed of the estate of the said Mary Catharine Stuart. These letters were issued on the 17th day of April, 1901.

No duty had been paid by the defendant as administrator of the estate of Sir Charles James Stuart or as administrator of the estate of the said Mary Catharine Stuart, either in the United Kingdom or in Ontario, in respect of the lands situate in this Province.

The defendant applied to the surrogate court of the united counties of Stormont, Dundas, and Glengarry, being the counties in Ontario wherein the bulk of the said lands are situated, to have both the above-mentioned letters of administration sealed with the seal of the said surrogate court and for legal authority to deal with the lands, and on such application a question arose as to the duty to be paid under the Succession Duty Act.

The defendant admits his liability as administrator of the estate of Sir Charles James Stuart to pay succession duty in respect of the said lands as forming the portion in Ontario of the estate which passed under the will and codicils of the said Sir Charles James Stuart, but denies any liability as personal representative under the will of the said Mary Catharine Stuart, to pay any duty in respect of these lands, and denies that there is any lien or charge on the lands under the Succession Duty Act other than and except the duty which he admits as aforesaid.

The plaintiff claims that, in addition to the duty admitted as aforesaid, the said lands are subject to another duty, that is to say, a duty in respect of the succession from Mary Catharine Stuart, and that such duty forms a lien upon the lands.

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By sec. 11 of ch. 9 of 62 Vict. (1899), sec. 4 of the Succession Duty Act (R.S.O. 1897, ch. 24) is amended by inserting clauses (g) and (h) of said 11th section as clauses (g) and (h) of said sec. 4.

This sec. 4 of the Succession Duty Act professes by various clauses to define the properties that are liable or subject to succession duty. Clause (g) of the 11th section of the Act of 1899, inserted as above into sec. 4 of the Succession Duty Act, amongst other things, says: "Any property of which a person dying after the coming into force of this section was at the time of his death competent to dispose; and a person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general or limited power as would if he were *sui juris* enable him to dispose of the property as he thinks fit . . . whether the power is exercisable by instrument *inter vivos* or by will or both." This clause (g) seems to have come into force on the 1st day of April, 1899, and, as before stated, the said Mary Catharine Stuart died on the 2nd day of March, 1901.

If no more remained to be said, it would seem reasonably plain that, according to the provisions of this clause (g), this property, upon the death of Mary Catharine Stuart, became subject to a succession duty, for she had a general power of appointment by will in respect of it, which she exercised by her last will, and this, as it appears to me, wholly independently of the succession duty to which the lands became subject upon the death of Sir Charles James Stuart, and to which this defendant submits. I cannot see that the fact that she survived Sir Charles James only a few days makes the matter in this respect different from what it would have been had she survived him for years. There is, however, another enactment, sub-sec. 2 of sec. 6 of ch. 8, 1 Edw. VII. (1901), which is: "The clause lettered (g) of sub-section 1 of section 4 of the Act is amended by adding at the end thereof the following words:—'Any succession, estate, income or interest which formed the subject of a power of appointment, whether such power is general or absolute, or is special or limited, shall, for purposes of this Act, be deemed to be derived from the donor of the power.'

If this last enactment were in force at the time of the death of Mary Catharine Stuart, the effect would, as I think, have been that the succession to the present defendant, Sir Edward Andrew Stuart, would have been, as a matter of law, derived from Sir Charles James Stuart, the donor of the power, and the duty arising, or rather to which the property became subject, upon the death of Sir Charles James, would be the only duty in the present case. But this last enactment did not take place till long afterwards.*

This state of things gave rise to the contention that this last enactment is declaratory of the law, so that the rights now are the same as if it had been existing and in force at the time of the happening of the facts of this case.

So far as I can perceive, the Interpretation Act applies to this ch. 8 of the Acts of 1901. This sub-sec. 2 of sec. 6 is an enactment by way of amendment, and the 55th clause of sec. 8 of the Interpretation Act, R.S.O. 1897, ch. 1, declares that the repeal or amendment of any Act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law. In the presence of this provision in the Interpretation Act, and in the absence of express words in the amendment indicating that it is declaratory of the law as it previously existed, I am unable to say that the sub-sec. 2 of sec. 6 of the Act of 1901 is to govern or has any bearing upon the present case.

I may say that I was much interested in the ingenious and forcible argument of Mr. Falconbridge in his efforts to apply the decision in the case *Attorney-General v. Theobald*, 24 Q.B.D. 557, to the present case. I have since considered the matter as well as I have been able and arrived at the conclusion that that case is distinguishable.

I am unable to read the above-mentioned sub-section in the Act of 1901 so as to make it declaratory of the law as it existed before the sub-section was passed, or retroactive in its effect. And I am of the opinion that the lands mentioned and referred to in the case stated are subject to the two duties as claimed by the plaintiff, the Attorney-General.

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*It was assented to on the 15th April, 1901.

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There will, therefore, be a judgment for the plaintiff (the Attorney-General) against the defendant for the amount of the two succession duties with costs (see the 13th paragraph of the case stated).

Judgment for the plaintiff, the Attorney-General, for the amount of the two duties with costs.

Order accordingly.

E. B. B.

[IN CHAMBERS.]

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SMITH V. SMITH ET AL.

Oct. 17.

Pleading — Reply — Regularity — Title to Land — Assignment of Mortgage — Attacking.

The statement of claim, in an action for a declaration that the plaintiff was entitled to a share in certain lands and to recover possession, alleged that the defendant society were in possession of the whole of the lands and in receipt of the rents and profits under a mortgage of a share or interest therein, made by two of the remaining defendants, who derived their title from the plaintiff's father or some of his heirs. The defendant society sought to defend their possession and to hold the rents and profits by setting up in their statement of defence a mortgage made by the plaintiff's father to one L. and by him assigned to the defendant society. The plaintiff replied that there was no consideration for the assignment of such mortgage, and that the alleged assignor was at the time of making it of unsound mind, to the knowledge of the defendant society:—

Held, that the reply raised an issue which the plaintiff was entitled to have tried, and it was not irregular or improper to raise it at that stage.

AN appeal by the plaintiff from an order of the Master in Chambers (made on the application of the defendants the Hamilton Provident and Loan Society) striking out the 10th paragraph of the plaintiff's reply.

The action was brought by James Leroy Smith against Jane Smith, Thomas Smith, the Hamilton Provident and Loan Society, and others, for a declaration that the plaintiff was entitled to a share in the lands of his father, Thomas Smith, deceased, for partition or sale of such lands, for possession, an account of rents and profits, mesne profits, and general relief. Paragraph 9 of the statement of claim alleged that the defen-

dants Jane Smith and Hugh P. Savigny executed a mortgage dated the 25th February, 1892, to the defendants the Hamilton Provident and Loan Society of their interest in the lands. Paragraph 10 alleged that the defendant society were, by their tenant, the defendant William L. Crowe, in possession of the lands, without the consent or permission of the plaintiff, and had been for some time in receipt of the rents and profits thereof. Paragraph 11 alleged that they had never accounted to the plaintiff for the rents and profits received.

The defendant society by their statement of defence (2) admitted that they were in possession of the lands and had been in receipt of the rents and profits since April, 1890, when they were put in possession by the sheriff in pursuance of a judgment against the defendants Jane Smith and Hugh P. Savigny for recovery of possession; (3) alleged that by mortgage dated the 10th December, 1877, and duly registered, Thomas Smith mortgaged the lands to one Leeson, and that Leeson assigned such mortgage to the defendant society by indenture dated the 25th February, 1892, and duly registered, and that such mortgage was still unpaid; (4) that by mortgage dated 5th February, 1892, and duly registered, the defendant Jane Smith (who then claimed to be the owner in fee) and Hugh P. Savigny mortgaged the lands to the defendant society to secure \$3,800 and interest, which mortgage was still unpaid and undischarged, and the society were entitled to possession thereunder; (5) they denied that the plaintiff had a right to recover possession of the lands or to have them partitioned or sold until the mortgage to Leeson should be fully paid and satisfied.

The 10th paragraph of the plaintiff's reply was as follows:

"The plaintiff further says that the said Richard Leeson never obtained or received any consideration for said alleged assignment, and had no dealings with the defendants the Hamilton Provident and Loan Society, and the plaintiff further says that the said Richard Leeson was, at the time of executing the said alleged assignment, and for some time previous thereto, of unsound mind, and was thereby incapable of making or understanding the nature and effect of the said alleged assignment, and the defendants the Hamilton Provident and Loan

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Society well knew that the said Richard Leeson was then of unsound mind and incapable of making the said alleged assignment or understanding its effect."

The appeal was heard in Chambers by Moss, J.A. (sitting by request as a Judge of the High Court) on the 30th September, 1901.

H. W. Mickle, for the plaintiff.

J. H. Moss, for the defendants the Hamilton Provident and Loan Society.

F. W. Harcourt, for the infant defendants.

October 17. Moss, J.A.:—I am unable to agree with the Master's conclusion in this case. If the defendants the Hamilton Provident and Loan Society think it important to their defence to set up the mortgage from the intestate Thomas Smith to Richard Leeson and the assignment to them by Leeson, I think the plaintiff is entitled to set up that the defendants are not in fact and in law the assignees of the mortgage. The question is whether he may properly do so in his reply.

As the plaintiff presents his case in the statement of claim, the defendants the Hamilton Provident and Loan Society are the mortgagees of the estate or interest of two persons who derived their title from the intestate or some of his heirs. The plaintiff alleges that these defendants have gone into possession of the whole of the lands and are accountable to the plaintiff and the other co-owners for rents and profits. The defendants the Hamilton Provident and Loan Society seek to defend their possession and their right to the rents and profits by virtue of the Leeson mortgage. In avoidance of this defence the plaintiff sets up the matters stated in the 10th paragraph of his reply. This appears to me to be the first stage at which the issue could be raised, and under our present system of pleading it was not irregular or improper to then raise it: *Hall v. Eve* (1876), 4 Ch. D. 341.

The pleadings fairly present an issue which the plaintiff is entitled to have tried if the defendants continue to defend their possession and claim to retain the rents and

profits under cover of the assignment to them of the Leeson mortgage: *Hayward v. Thacker* (1871), 31 U.C.R. 427; *MacLaughlin v. Lake Erie and Detroit River R. W. Co.* (1901), 2 O.L.R. 151.

The appeal is allowed and the Master's order is reversed. Costs of the appeal to the plaintiff in any event. Costs of the application to the Master to be costs in the action.

T. T. R.

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[IN CHAMBERS.]

REX V. MORGAN.

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Oct. 12.

Criminal Law—Summary Trial—Powers of Magistrate—Theft—Attempt to Commit—Conviction—Description of Offence—Warrant of Commitment—Absence of—Order for Further Detention.

It is competent for a magistrate upon the summary trial before him of a prisoner charged under sec. 783 (a.) of the Criminal Code with having committed theft, to convict him of the offence of attempting to commit it provided for in sub-sec. (b.)

The offence of theft from the person is sufficiently described in popular language as "picking the pocket of a person."

To authorize the detention of a person under a conviction there should be a warrant of commitment; but where there was none, and the conviction itself was lodged with the gaoler as his authority for the detention, there being an offence proved and a proper conviction for the offence, and no merits on the part of the prisoner, the Judge before whom the prisoner was brought upon *habeas corpus* exercised the power conferred by sec. 752 of the Code, and directed that the prisoner should be further detained, and that the convicting magistrate should issue and lodge with the gaoler a proper warrant.

THE prisoner on the 19th June, 1901, was charged before the police magistrate for the town of Barrie that he did on the 15th June, 1901, "pick the pocket of a woman named Salter and did steal from her person a sum of money." The prisoner elected to be tried summarily under the group of sections of the Criminal Code beginning with sec. 782, and was remanded for trial until the 24th June, 1901, and on that day he was convicted of having "attempted to pick the pocket" of Margaret Salter, and was sentenced "to be imprisoned in the Central Prison at Toronto and there kept at hard labour for

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the term of six months." He was taken to the Central Prison, and the conviction, which recited the charge and the prisoner's election to be tried summarily and his conviction as above, signed and sealed by the magistrate, was lodged with the gaoler at the Central Prison as the warrant for his detention there.

Writs of *habeas corpus* and *certiorari* having been issued, the depositions taken before the magistrate upon the trial, as well as the information, were brought up on the *certiorari*, and the gaoler of the Central Prison brought up the conviction with the prisoner as his warrant for detaining him.

On the 24th September, 1901, *E. E. A. DuVernet* moved for the prisoner's discharge, upon the following grounds: (1) that, being charged with stealing from the person and having elected to be tried summarily for that offence, he could not be convicted of the attempt merely; (2) that no proper warrant of commitment had been issued, and that no defect could be remedied after the prisoner had been brought before the Court by *habeas corpus*; and (3) that no offence was described in the conviction.

J. R. Cartwright, K.C., for the Crown, shewed cause.

October 12. STREET, J.:—The only objection as to which I have any doubt is the first, viz., that the prisoner, being charged with the offence of larceny from the person, was convicted of an attempt to commit it. My doubts have been caused by the fact that in sec. 783* of the Code the offence of theft and of attempting to commit theft are the subjects of separate sub-sections, and there is no section applicable to summary trials of indictable offences before magistrates which seems directly to give to the magistrate trying them the powers given by secs. 711 and 774 to other tribunals under the same circumstances, that is to say, the power to convict of an offence included in, but not precisely the same as, that charged. I

* 783. Whenever any person is charged before a magistrate, (a.) with having committed theft . . . and the value of the property alleged to have been stolen . . . does not, in the judgment of the magistrate, exceed ten dollars; or (b.) with having attempted to commit theft; . . . the magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way.

think, however, that the charge of the lesser offence must necessarily be taken to be included in the greater, and that in a summary trial of this kind a prisoner charged with committing a theft may be convicted of attempting to commit it, just as one charged with committing an aggravated assault might be convicted of a common assault. This view is strongly supported by the effect given to a conviction or a dismissal of the charge by secs. 798 and 799; † for a contrary view would enable a prisoner charged with theft, and tried under the group of sections now under consideration, to escape scot free, however clearly an attempt to commit the offence were proved.

In my opinion, therefore, it was competent for the magistrate trying the prisoner charged under sub-sec. (a.) of sec. 783 with having committed theft, to convict him of the offence of attempting to commit it provided for in sub-sec. (b.)

I think the offence of theft from the person is sufficiently described in popular language as picking the pocket of a person, and the evidence before me amply supports the conviction.

I think there should have been a warrant of commitment, although the Code is silent upon the point, and no form is given. The conviction in the gaoler's hands is an extremely informal warrant; but, there being an offence proved and a proper conviction for the offence, and absolutely no merits in the application, I exercise the power conferred upon me by sec. 752 * of the Code, and direct that the prisoner be further detained under the present proceedings, and that the police magistrate before whom he was convicted do issue a proper

† 798. Every conviction under this part shall have the same effect as a conviction upon indictment for the same offence.

799. Every person who obtains a certificate of dismissal or is convicted under the provisions of this part, shall be released from all further or other criminal proceedings for the same cause.

* 752. Whenever any person in custody charged with an indictable offence has taken proceedings before a judge or criminal court having jurisdiction in the premises by way of *certiorari*, *habeas corpus* or otherwise, to have the legality of his imprisonment inquired into, such judge or court may, with or without determining the question, make an order for the further detention of the person accused, and direct the judge or justice under whose warrant he is in custody, or any other judge or justice to take any proceedings, hear such evidence, or do such further act as in the opinion of the court or judge may best further the ends of justice.

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warrant of commitment and lodge it with the gaoler of the Central Prison on or before the 1st day of November, 1901, and that, if the same be not so lodged before that date, the prisoner be at liberty, if so advised, to apply for a further writ.

In the meantime I am of opinion that the prisoner is not entitled to be discharged from custody.

T. T. R.

[This case has been carried to the Court of Appeal.]

[DIVISIONAL COURT.]

D. C.

BATEMAN V. MAIL PRINTING CO.

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Defamation—Pleading—Justification—Particulars—Appeal—Res Judicata.

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The libel originally complained of in the statement of claim stated that the plaintiff had been cashiered from the army for cheating at cards, and also that divorce proceedings had been taken against him. The defendants pleaded justification to the whole, and added two clauses to the same paragraph of their statement of defence, one of which related to the first charge and the other to the second. The first of these clauses was as follows: "The plaintiff was obliged to leave the army on the ground that he had cheated at cards, and stories of the peculiar character of the plaintiff's card-playing and of his having been cashiered from the army for cheating at cards were in circulation in the city of Vancouver." The plaintiff applied for an order striking out both these added clauses, but the application was refused on the ground that the defendants were entitled to plead them as particulars of the defence of justification. There was no appeal from this order, but the plaintiff amended (by leave) by striking out so much of his complaint as related to the divorce proceedings, and the defendants then struck out of their defence the second clause, relating to the divorce proceedings. An application was then made to strike out the first clause, that relating to the plaintiff being cashiered from the army, and was refused by the Master and by a Judge in Chambers on appeal:—

Held, per FALCONERIDGE, C.J., that the plaintiff was not prejudiced by the clause; and, moreover, approving *Dodge v. Smith* (1901), 1 O.L.R. 46, that a second appeal was not to be encouraged in a case of this kind.

Per STREET, J., that the matter of the second application was *res judicata* by the order made on the first application and not appealed against.

AN appeal by the plaintiff from an order of Boyd, C., in Chambers, dismissing an appeal by the plaintiff from an order of the Master in Chambers dismissing a motion by the plaintiff to strike out a portion of the statement of defence as embarrassing.

The action was for an alleged libel published in the defendants' newspaper on the 29th November, 1900.

The libel originally complained of was set out as follows :—

“VANCOUVER GETS A RUDE SHOCK.—The genuineness of Bateman's connections with various aristocratic people in England was known to many people here, so many refused to believe the stories of the peculiar character of Bateman's card-playing and of his having been cashiered from the army for cheating at cards. *To-day a rude shock was given society when solicitors served papers in a divorce suit filed in England by the Hon. Beatrice Bateman against her husband Captain Bateman.*”

The defendants pleaded, amongst other defences, the following :—

“4. The defendants further say that if it be found that they did print and publish the words complained of, which they deny, the said words are true in substance and in fact. The plaintiff was obliged to leave the army on the ground that he had cheated at cards, and stories of the peculiar character of the plaintiff's card-playing and of his having been cashiered from the army for cheating at cards were in circulation in the city of Vancouver. *The plaintiff, who is a married man, having a lawful wife residing in England, came to the city of Vancouver about the latter part of the year 1899, and brought with him a woman who was not his wife, but with whom he was living in adultery, and the plaintiff represented the said woman as his wife, and introduced her as such to many respectable people in the said city, who, believing her to be the plaintiff's wife, received her into their homes. While the plaintiff and his said mistress were so residing in the city of Vancouver, the plaintiff's lawful wife instituted legal proceedings leading to a divorce, which were served upon the plaintiff in the city of Vancouver, and which became publicly known, and the exposure of the matters above set forth caused a public scandal and sensation in the said city.*”

On the 2nd May, 1901, the solicitors for the plaintiff served notice of a motion before the Master in Chambers to strike out all that part of the 4th paragraph of the statement of defence above set forth from the words “The plaintiff was obliged to

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leave the army" to the end, on the ground that the allegations therein were scandalous and embarrassing. The motion was argued before the Master in Chambers, and was dismissed by him upon the ground that the portion of the pleading complained of contained merely particulars of the justification pleaded, and that the defendants were therefore entitled to plead it. The order dismissing the motion gave leave to the plaintiff, upon his own application, to strike out from his statement of claim the portion of it which is italicized above, and gave leave to the defendants to amend their statement of defence in the event of his doing so. The plaintiff thereupon struck out from his statement of claim the words italicized, and the defendants struck out from their statement of defence the portion which is above printed in italics.

On the 15th May, 1901, the plaintiff gave notice of a motion before the Master in Chambers to strike out all that portion of the 4th paragraph of the defendants' amended statement of defence beginning "The plaintiff was obliged to leave the army" as being embarrassing. On the 20th May, 1901, the Master in Chambers dismissed this motion with costs. The plaintiff appealed, and the Chancellor heard the appeal and dismissed it with costs on the 27th May, 1901. The present appeal was from the Chancellor's order.

The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and STREET, J., on the 3rd June, 1901.

C. S. MacInnes, for the plaintiff. Paragraph 4 is a plea of justification, not admitting publication, and then going on to set up some other facts, which are not the facts stated in the alleged libel, nor particulars under the justification defence. Such a defence is bad: *Rassam v. Budge*, [1893] 1 Q.B. 571; The Annual Practice, 1901, p. 265. The Master did not dismiss the second application on the ground that the matter of it was *res judicata* by the previous order.

J. B. Clarke, K.C., for the defendants. The defence complained of is simply justification and particulars of the justification, which particulars are required by our practice: *Macdonald v. Mail Printing Co.* (1900), 32 O.R. 163; *Fulford v. Wallace* (1901), 1 O.L.R. 278. Whether the Master decided the motion

on the ground of *res judicata* or not, it was *res judicata*, and the Chancellor so held. There should not have been a second appeal in a matter of this kind: *Dodge v. Smith* (1901), 1 O.L.R. 46.

October 29. FALCONBRIDGE, C.J.:—I think the order appealed from is right: *Fulford v. Wallace*, 1 O.L.R. 278 *Macdonald v. Mail Printing Co.*, 32 O.R. 163.

How the plaintiff can be prejudiced by adding to the plea of justification a statement of facts as particulars, I am at a loss to see.

But, if I had any doubt on the subject, I fully concur in, and apply here, the language of the learned Chief Justice of the Common Pleas in *Dodge v. Smith*, 1 O.L.R. 46, as to the propriety of encouraging appeals from a Judge in Chambers in questions such as this.

In my opinion, the appeal should be dismissed with costs.

STREET, J. (after stating the facts as above):—The libel originally complained of in the plaintiff's pleading is divided into two distinct heads, the one alleging that the plaintiff had been cashiered from the army for cheating at cards, the other alleging that divorce proceedings had been taken against him. The defendants pleaded justification to the whole, adding, however, two paragraphs, one of which clearly related to the first charge, and the other to the second. The plaintiff applied on the 2nd May, 1901, to have both these added paragraphs struck out, but the Master held that the defendants were entitled to plead both of them as particulars of the plea of justification. Then the plaintiff, without appealing from this decision, obtained leave to strike out so much of his complaint as related to the divorce proceedings, and the defendants at once struck out the portion of their defence which purported to be particulars of the plea of justification so far as the divorce proceedings were concerned. This left upon the record the plaintiff's complaint that the defendants had libelled him by stating that he had been cashiered from the army for cheating at cards, and the defendants' answer of justification with the added paragraph beginning "The plaintiff was obliged to leave the army," which the Master held to be a proper part of the plea of justification.

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I think it is plain from the facts I have mentioned that we should hold that the Master has decided that the defendants have a right to retain upon the record this addition to the plea of justification, and that we could not order the addition to be struck out without reversing a decision of the Master between these parties in this action which has not been appealed against. The plaintiff might undoubtedly have raised the question raised upon the present appeal by an appeal against the original order of the Master in Chambers, but, instead of doing so, he submitted to that order and acted upon it by amending his pleadings. I think the plaintiff's solicitors appear to have misconceived their right to raise the question upon a new motion, and I should have preferred to exercise our discretion and allow the plaintiff to appeal, and to treat the present motion as an appeal, notwithstanding the lapse of time, so that we might have dealt with the question involved, upon its merits. My lord the Chief Justice, however, thinks that we should not exercise this discretionary power in the present case, and I do not press my view, under the circumstances, in opposition to his.

The appeal must, therefore, be dismissed with costs.

T. T. R.

[IN CHAMBERS.]

HOLDEN V. GRAND TRUNK R.W. CO.

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*Practice—Third Party Procedure—Indemnity—Directions—Order Allowing Notice—Appeal.*Sept. 20.
Oct. 17.

In an action to recover damages for the death of an employé of the defendants, who was killed at the crossing of defendants' railway with another railway, the defendants obtained an *ex parte* order allowing them to serve a third party notice upon the other railway company, claiming indemnity under an agreement whereby the latter company were allowed to put in the crossing at the point where the accident happened, upon their indemnifying the defendants against any claim for damages arising during the progress of the work. The defendants asserted and the other company denied that the accident in question happened during the progress of the work :—

Held, that it was desirable that the question as to the defendants' liability to the plaintiff should be established in such a way as to be binding upon the third parties, although all the matters in dispute between the defendants and the third parties could not be determined in the action.

Baxter v. France (No. 2), [1895] 1 Q.B. 591, distinguished.

Form of order giving directions as to trial and questions of costs in such a case, settled.

Semble, referring to *Baxter v. France*, [1895] 1 Q.B. 455, 458, that it was the duty of the third parties, if they objected to being added, to appeal within due time against the order allowing the notice to be served upon them.

THIS action was brought by the administratrix of the estate of an employé of the defendants, who had been killed at a crossing of the defendants' railway with that of the Toronto, Hamilton, and Buffalo Railway Company, owing, as alleged, to the negligence of the defendants, to recover damages for the death.

The defendants, on the 19th June, 1901, obtained, *ex parte*, from the Master in Chambers, an order allowing them to issue a third party notice for service upon the Toronto, Hamilton, and Buffalo Railway Company, under Rule 209. The third party notice was served upon the Toronto, Hamilton, and Buffalo Railway Company on the 22nd June, 1901; an appearance was entered by them; and the pleadings in the action were served upon them, in pursuance of a demand to that effect.

An application was made by the defendants, upon notice to the plaintiff and to the third parties, for directions as to the trial of the questions between the defendants and the third parties.

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The application was heard by Mr. Winchester, the Master in Chambers, on the 18th September, 1901.

D. L. McCarthy, for the defendants.

D'Arcy Tate, for the third parties.

G. Lynch-Staunton, K.C., for the plaintiff.

September 20. THE MASTER IN CHAMBERS:—The defendants' application is opposed by the third parties on the ground, among others, that all the disputes between the defendants and the third parties arising out of the transaction cannot be tried and settled in this action.

It appears that the defendants, in addition to claiming indemnity from the third parties for the plaintiff's claim herein, have also issued a writ against the third parties for damages sustained by the defendants in the accident which caused the damages sued for by the plaintiff herein.

In *Baxter v. France* (No. 2), [1895] 1 Q.B. 591, it was held by the Court of Appeal that, as all the matters in dispute between the defendants and the third parties could not be determined in the action, directions under the third party procedure were properly refused.

For the reasons given in the judgment in that case, I refuse to give directions as to the third party trial herein, and set aside the third party order, with costs to be paid by the defendants to the third parties. The plaintiff's costs to be costs to her against the defendants in any event of the cause.

The order of the Master, as issued, simply set aside the third party notice, with costs as above.

The defendants appealed, and their appeal was heard by STREET, J., in Chambers, on the 26th September, 1901.

Wallace Nesbitt, K.C., for the defendants.

D'Arcy Tate, for the third parties.

October 17. STREET, J.:—The learned Master has followed the decision arrived at in *Baxter v. France* (No. 2), [1895] 1 Q.B. 591 (C.A.), but he has overlooked the fact that in that case the person upon whom the third party notice was served was already a defendant in the original action, and would,

therefore, necessarily be bound by the judgment. The reasons making it important in the present case that the third parties should be brought in and given an opportunity of being present at the trial so that they might be bound by the result, did not, therefore, exist in that case. Moreover, it appears from *Baxter v. France*, [1895] 1 Q.B. 455, at p. 458, that it was the duty of the third party, if he objected to being added as a third party, to appeal within due time against the order allowing the notice to be served upon him, where, as here, an order is required allowing the notice to be served on him. The practice is different where the notice is served upon a person already a defendant, for no order is there necessary allowing the notice to be served, and there is, therefore, no order to appeal against.

In the present case an agreement is produced between the defendants and the Toronto, Hamilton, and Buffalo Railway Company, allowing the latter to put in the crossing at the point where the accident happened, upon their agreeing, as they do, to indemnify the defendants against any claim for damages arising during the progress of the work. The defendants say that the accident in question happened during the progress of the work, and that, if they are liable to the plaintiff, the third parties are bound to indemnify them. The third parties say that they had handed over the work to the defendants before the accident occurred, and that they are, therefore, not liable to indemnify the defendants. They further say that the defendants are not liable to the plaintiff because the accident was caused by the negligent conduct of the deceased.

If the plaintiff is entitled to recover against the defendants, and the third parties are bound under their agreement to indemnify the defendants, it would be desirable that the question as to the defendants' liability to the plaintiff should be established in such a way as to be binding upon the third parties, and I think the learned Master should have ordered that the third parties should be at liberty to attend the trial and cross-examine the plaintiff's witnesses and adduce evidence with the view of disputing the plaintiff's right to recover from the defendants, and to address the jury, and that the third parties should be bound by the result of the trial and judgment in the same manner and to the same extent as the defendants

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are bound by it, and with the right, if so advised, upon giving proper security to the defendants, to appeal in their names from any such judgment. I think this order should now be made, and I so direct.

The third parties should pay the costs of the present appeal forthwith after taxation. The costs of the application for directions as between the plaintiff and the defendants should be costs in the cause to the plaintiff in any event; the defendants should be entitled to add those costs, and also the costs as between them and the third parties of the application for directions, to their claim for indemnity against the third parties, to be dealt with when that claim is determined. The claim of the defendants to be indemnified by the third parties is to be tried after the trial of the present action, and either the defendants or the third parties may apply further for directions as to the manner and time and place of trial of that question. Upon that trial the question of the costs above-mentioned, as well as of the claim for indemnity under the contract, will be finally disposed of. In case the plaintiff's action is dismissed, the defendants are to pay to the third parties their costs of the proceedings and trial forthwith after taxation.

T. T. R.

BENNETT V. GRAND TRUNK R.W. CO. ET AL.

1901

Oct. 16

Railways—Carriage of Animals—Nuisance—Proper Exercise of Powers—Negligence.

Railway companies to which the Dominion Railway Act applies are authorized by law to carry cattle and hogs, and as a necessary incident thereto for the purpose of shipping the animals to have pens for herding them, and they are not liable if, in the proper exercise of their powers in doing so, without negligence, they create a nuisance.

London and Brighton R.W. Co. v. Truman (1885), 11 App. Cas. 45, followed.

THIS was an action brought by Sarah Bennett against the Grand Trunk Railway Company and the Wabash Railway Company to recover \$2,000 damages and for an injunction in respect of an alleged nuisance.

The statement of claim set forth that the plaintiff was the owner and occupier of a house and lot in the city of St. Thomas; that the defendants were largely shippers of hogs through the city of St. Thomas, and fed them in enclosures near the plaintiff's house, and also shipped a large quantity of hogs from the city and fed them and loaded them on the cars near the plaintiff's house, thereby causing the air to be polluted with a noxious smell, making it very disagreeable and inconvenient for the plaintiff and other occupants of her house, and rendering her house unwholesome and uncomfortable to live in; that the defendants had continued the nuisance for several years, and still continued it, and the plaintiff had suffered large damages in consequence.

The defendants pleaded that they were not guilty by statute, 16 Vict. ch. 37, sec. 2; also the Railway Act, 51 Vict. ch. 29, sec. 287 (D.)

The action was tried before STREET, J., without a jury at St. Thomas, on the 16th October, 1901.

The effect of the evidence is stated in the judgment.

John A. Robinson, for the plaintiff. The Railway Act does not provide for the establishment of pig-sties beside railway tracks, in the general powers given to companies, and so, even without negligence, the defendants were responsible for a nuisance; but, at all events, the evidence shewed negligence in the way in which the sties were kept; and, even if the

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keeping of pigs in sties was allowable at all, the keeping them waiting until a sufficient number was collected for shipping was not justified by the Railway Act. The sties were a nuisance when the pigs were there and after they were removed, and the floor should have been made of cement or some like substance so that it could have been cleaned immediately after it was used. At the time the Railway Acts were passed there were no shipments of cattle and pigs, and therefore there is no express provision authorizing the building of pens or the shipment of cattle and pigs over the railway, and if they are shipped, the railway company act at their own peril if a nuisance is committed. This case is governed by *Rapier v. London Tramways Co.*, [1893] 2 Ch. 588.

Wallace Nesbitt, K.C., for the defendants. This case is indistinguishable from *London and Brighton R. W. Co. v. Truman* (1885), 11 App. Cas. 45, and is indeed stronger than that case, because while it was admitted there that, under the general powers of the railway company to ship freight under the original Act, there would have been no question as to the right of the company to erect the pens in question for the shipment of cattle, it appeared that subsequent legislation had been obtained for the acquisition of a larger tract of land without the express power of building pens in connection with that land; yet the Court held that that distinction did not affect the decision. In this case the Railway Act provides for the extension of station accommodation, etc., wherever it is necessary for the traffic of the railway and for the powers of expropriation, and provides specifically for the transportation of all goods, freight, merchandise, etc., which by the Interpretation Act includes cattle and pigs, and therefore as a necessary incident to the carrying on of railway business is the necessity for the herding together of large numbers of pigs and cattle, because shippers will not ship except in large quantities, namely, by the car load, etc., and, as a necessary incident to the providing of facilities for shipping, pens are required, which necessarily creates more or less nuisance, and this must be said to have been contemplated by the statute.

STREET, J. (at the conclusion of the argument):—I do not think that it has been shewn that the defendants here are

guilty of any negligence in carrying on their business; and I think the case is within the authority of *London and Brighton R.W. Co. v. Truman*, 11 App. Cas. 45, decided by the House of Lords in England in 1885.

In that case it was held that the railway company, authorized among other things to carry cattle and to acquire land for the purpose of shipping them, were not subject to be charged as having created a nuisance because of a nuisance which was the natural result of their carrying on the business that they were authorized to do.

Now, nothing has been shewn as to any nuisance committed by the Wabash Railway Company, but the Grand Trunk Railway Company are authorized to carry on the business of carrying goods and so on, and no doubt—there is no question about it—in carrying cattle they are exercising the powers that they were authorized by law to exercise. It is necessary that they should have proper places for shipping animals, including pigs, and they have those pens here, which they appear to have taken all proper pains with. The board of health inspector of the city of St. Thomas tells us that in fact they have been guilty of no negligence; that he does not think it possible to ship hogs without this smell; that the shippers came before the board of health committee, and said they would stop shipping hogs if the concrete floor suggested were put in, and he said the defendants had used every effort to make the nuisance from smell as small as possible, and that they had always complied promptly with any suggestion he had made in regard to it.

Well, as long as the railway companies have these powers, it is a principle that, exercising them without negligence, they are not liable if, in the proper exercise of the powers, they create a nuisance; and the case of *London and Brighton R.W. Co. v. Truman* is very strongly in point; in fact, I think the principle of it is conclusive upon the principles of this case, with the findings I make, that is to say, that, in the proper exercise of their powers, they have created a nuisance, and it is not by the improper exercise of their powers that it has been created, and that they have used their best endeavours to make the nuisance as small as possible, so that I think the action must be dismissed.

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[IN THE COURT OF APPEAL.]

C. A.

JONES V. LINDE BRITISH REFRIGERATION COMPANY.

1901

Oct. 16.

Master and Servant—Dual Employment—Profits.

While a servant cannot in the course of his employment, and in connection with the services he has agreed to render to his master, earn for his own benefit any remuneration or profit, he can do so in connection with any collateral or independent work or business, not carried on in competition with that of the master.

The manager of a cold storage company was held entitled therefore to a commission on the sale to another company of a cold storage plant effected by the makers thereof through his efforts, the cold storage company not being themselves makers of or dealers in cold storage plant.

Judgment of Boyd, C., 32 O.R. 191, reversed.

APPEAL by the plaintiff from the judgment of Boyd, C., reported 32 O.R. 191.

The following statement of the facts is taken from the judgment of MOSS, J.A.

This is an action to recover the sum of \$400 for commission on a sale by the defendants to the Collingwood Meat Company of a cold storage plant. The defendants do not dispute that they agreed to pay this sum as commission on the sale in question, but among their answers to the plaintiff's demand they say that he earned the commission as a servant or employee of the Toronto Cold Storage Company, to whom they have paid the amount.

In the latter part of the year 1896 the plaintiff and defendants made an arrangement the terms of which were set forth in a letter to the plaintiff dated the 7th of December, 1896, whereby he was to receive from the defendants a commission of 5 per cent. on all orders taken by him direct or received through his assistance, subject to reduction to 2½ per cent. under certain conditions. And in pursuance of this arrangement the plaintiff had taken orders for or given the defendants information which enabled them to obtain orders for several sets of their cold storage plant or machinery.

In the year 1897 the Toronto Cold Storage Company was incorporated and entered into business. In August of that year the plaintiff became managing director, and so continued until December, 1898, or January, 1899, when he resigned from

the directorate and became manager of the company, which position he held at the time of the transactions out of which the present claim arises. He was paid a salary of \$1,500 per annum. He had the general management and control of the business of the company, with power to engage and discharge employees in the business, to make contracts, and make, sign and endorse the company's name to cheques, notes, drafts, bills of exchange and lading, warehouse receipts and other documents necessary for the conduct of the company's business, and was responsible for the safe custody and control of the company's books, papers, funds and securities. His duties required him to superintend the running of the cold storage machinery and to inspect it, to look after the correspondence, attend to people who came in—customers and others—making enquiries. Generally speaking, he had the supervision of the entire business, and was bound to devote all necessary time and attention to the affairs of the company. The business of the company was the usual and ordinary business of cold storage, that is, the providing of storage in artificially cooled or refrigerating chambers for the preservation of articles liable to be damaged by heat. It was not part of the company's business to manufacture or sell cold storage or refrigerating machinery or plant, or to solicit or obtain orders for such articles. In the latter part of 1899 the plaintiff learned, partly through communications from Mr. Thomas Long, who was president of the Toronto Cold Storage Company and also of the Collingwood Meat Company, and partly from other sources, that the latter company was contemplating replacing their plant. He communicated this information to the defendants, who opened negotiations with the Collingwood Meat Company for the sale to it of one of the defendants' plants. Another manufacturing company was also offering to supply the Collingwood Meat Company, and the directors, being in doubt as to the relative merits of the two systems, sought the advice of the plaintiff, who was known to be a capable expert on the subject. Mr. Long, the president of the two companies, spoke to him on the subject, and asked him to accompany him to Collingwood to meet the executive committee of the Meat Company and have a friendly talk with them. The plaintiff agreed, and early in January went to

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Collingwood and inspected the Meat Company's premises in company with the executive committee, and discussed with them the merits of the two systems offered to them. He advocated the purchase of the defendants' system, and while doing so he kept the defendants' advised of the situation, and made suggestions to them as to what they should do in order to secure the order. In the end the Meat Company placed its order with the defendants at a sum considerably below the original tender.

The plaintiff received from the Meat Company a cheque for \$10 to cover the expenses of his trip to Collingwood. During this time neither Mr. Long nor any one connected with the Toronto Cold Storage Company or the Collingwood Meat Company was aware of the arrangement between the plaintiff and defendants. In June, 1900, the plaintiff left the employ of the Toronto Cold Storage Company. At that time a correspondence was going on between him and the defendants with reference to the commission, and a letter addressed to him fell into the hands of the Toronto Cold Storage Company, which led to inquiry of the defendants and the disclosure of the arrangement. The Toronto Cold Storage Company thereupon claimed the commission. The defendants at first contended that it should be paid to the plaintiff, but there being an unsettled account between them and the Toronto Cold Storage Company, and the latter having agreed to indemnify the defendants against any claim, they adjusted the matter of the two claims, and took from the Toronto Cold Storage Company an agreement of indemnity.

The appeal from the judgment in the defendants' favour was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 19th and 20th of March, 1901.

Wallace Nesbitt, K.C., and *C. B. Nasmith*, for the appellant. With the general principle that a servant cannot make a personal profit in the course of his employment, we of course do not quarrel, but this case does not fall within it. It is clear from the evidence that in aiding in effecting this sale the plaintiff was doing something entirely outside his ordinary

employment, and something which in no way conflicted with the duty he owed to his employers. He is therefore entitled to the commission.

H. S. Osler, and *C. S. MacInnes*, for the respondents. It was because of his position in the Storage Company, and owing to the information he could, as their manager, give as to the working of the plant that he was consulted as to the sale, and the time devoted by him to the matter was time which he was bound to devote to the interests of the Storage Company. He, therefore, cannot recover the commission for his own benefit; it must go to his employers: *Bowstead's Law of Agency*, p. 140; *Morison v. Thompson* (1874), L.R. 9 Q.B. 480; *Thompson v. Havelock* (1808), 1 Camp. 527; *Williamson v. Hine*, [1891] 1 Ch. 390.

Nesbitt, in reply.

October 16. MACLENNAN, J.A.:—I think this appeal must be allowed. The contract sued on is not at all disputed, but the defendants say that the services for which they contracted to pay the plaintiff were rendered by him not in his individual capacity but as the manager of the Toronto Cold Storage Company, and that they have paid the company.

With great respect to the learned Chancellor, I do not think the service rendered by the plaintiff to the defendants was rendered as the Toronto Cold Storage Company's manager. It was no part of the Storage Company's business to procure customers for manufacturers of machinery, which was the service rendered by the plaintiff to the defendants, and for which they agreed to pay him, and I see nothing in the case or in the evidence which would entitle the Storage Company to claim the commission, earned by the plaintiff, from the defendants.

The appeal should be allowed with costs here and below.

Moss, J.A.:—No doubt, if the plaintiff earned the commission for or on behalf of the Toronto Cold Storage Company, the payment to his principals is a complete answer to his demand, and he cannot recover in this action. The question is, could the plaintiff on his own account and for his own benefit render to the defendants the services which earned the commission,

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and if he could, did he intend to render them on his own behalf?

If the services which earned the commission were within the range of the Toronto Cold Storage Company's business, or were such as by the terms of his employment the plaintiff would be bound to undertake upon the order or request of the company, there would of course be no difficulty in concluding that he could not undertake them for himself or on his own account.

The general rule is clear that the profits acquired by a servant or agent in the course of or in connection with his services or agency belong to his master or principal: *Morison v. Thompson*, L.R. 9 Q.B. 480. But the principle, founded upon the maxim "*Quicquid acquiritur servo acquiritur domino*," which took its origin from the relationship of lord and vassal, and was afterwards extended to apprentices and servants, does not, I venture to think, apply to the fullest extent to every kind of occupation or employment, or to every class of employee or agent. For example, if an employee or servant invents a new and useful device, the law accords the benefit to himself and not to his master, unless he was specially employed to invent for his employer. So a partner is in a sense an agent for his co-partners, and is bound, in the absence of special agreement to the contrary, to devote his time and services for the benefit of the partnership business. But this does not prevent him from bestowing labour, time and thought to other interests out of which he may receive a profit to himself if the purposes are wholly without the scope of the partnership business and not competing with it. In *Dean v. Macdowell* (1878), 8 Ch. D. 345, the general law on this head was fully set forth by Sir Geo. Jessel, M.R., and the Court of Appeal. This was followed in *Aas v. Benham*, [1891] 2 Ch. 244, where the question of the right of one copartner to retain to himself certain commissions and other remuneration which he had received in connection with another business, was treated as one of fact to be determined upon the circumstances of the case. But the trial Judge, who decided against the right of the partner, and the Court of Appeal, which determined the case in his favour, recognized the law as stated in *Dean v. Macdowell*.

So a paid agent employed to perform certain services is—as pointed out by Kekewich, J., in *Williamson v. Hine*, [1891] 1 Ch. 390—bound to discharge all those duties, multifarious or otherwise, and onerous or otherwise, which the terms of that agency cover; and, as respects any service coming within the terms of his duty and remuneration, he is not entitled to receive a commission, or if he does, it belongs to the principal. But the learned Judge limits the rule, just as it is limited in the case of partners, to services within the scope or terms of the agency, and not antagonistic to or inconsistent with his duty to his principal.

And I do not think the law is so extreme in the case of employees or servants as to prevent them absolutely from engaging their minds in other occupations out of the hours of their service, where the occupation is not inconsistent with or antagonistic to the master's business or interest. In the case of this plaintiff, possessed of special skill in a branch of knowledge which his employment with the Toronto Cold Storage Company did not call upon him to devote to the furtherance of its business, there seems no good reason why he should not be allowed to profit by it if in doing so he was not interfering with the company's business or prejudicing its interests. The information which he gave the defendants in the first instance, and the subsequent communications with them, were in no way opposed to the Toronto Cold Storage Company's interests, and were such as, in my opinion, the plaintiff might give without breach of any duty he owed that company.

It is quite clear that he did not intend to give these services to the defendants for the benefit of the company, and the company was not expecting to benefit by them. Neither did it suffer any loss or disadvantage through the plaintiff's actions. It is urged that the Toronto Cold Storage Company, in permitting the plaintiff to visit Collingwood, was extending his duties to the performance of the task of advising the Collingwood Meat Company, and that for anything gained by reason of that the Toronto Cold Storage Company was entitled to make claim. The facts shew that the plaintiff was not sent by the Toronto Cold Storage Company to act as its servant or employee in advising the Collingwood Meat Company. If he assumed a duty,

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it was towards the latter company. It is not necessary to determine that company's rights against the plaintiff, nor to say whether it could successfully maintain that the \$400 should be paid to it. Neither that company nor its rights are before the Court. But it may be pointed out that the defendants do not assert, nor does the evidence support the proposition, that they bribed the plaintiff or entered into a corrupt bargain with him for compensation in consideration of his inducing the Collingwood Meat Company to purchase their machinery, or that the purchase price was increased to that company by the amount of the commission to be paid him. The commission had substantially been earned before the plaintiff went to Collingwood at all. And the only ground the defendants made before action for refusing to pay it to the plaintiff was the demand of the Toronto Cold Storage Company that the money belonged to it.

I think the defendants have failed to shew any justification for paying to the Cold Storage Company, and that there should be judgment for the plaintiff with costs here and below.

ARMOUR, C.J.O., and LISTER, J.A., concurred.

OSLER, J.A., took no part in the judgment.

Appeal allowed.

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[IN THE COURT OF APPEAL.]

IN RE TOWNSHIP OF ROCHESTER AND TOWNSHIP OF MERSEA
(No. 2).

C. A.

1901

Sept. 21.

Drainage—Artificial Drain—Repairs—Outlet.

Section 75 of the Drainage Act, R.S.O. 1897, ch. 226, applies only to drains artificially constructed and does not apply to the repair or improvement of a natural watercourse.

Sutherland-Innes Company v. Romney (1900), 30 S.C.R. 495, considered and followed.

Observations upon the private Act, 1 Edw. VII., ch. 72 (O.), validating the by-laws in question in that case.

Where part of a drainage work to which the provisions of sec. 75 apply is out of repair, it is not necessary before initiating proceedings for the improvement of the drain under that section for the initiating township to repair the portion of the existing drain which it is bound to repair, MACLENNAN, J.A., dissenting.

Both classes of work may be provided for in the same by-law, the engineer in that case estimating and assessing separately the cost of each class.

Judgment of the Drainage Referee varied.

APPEAL by the township of Rochester from the judgment of the Drainage Referee.

The particulars of the drainage work in question are given in the report of the previous appeal, 26 A.R. 474. Upon the reference back directed by the Court of Appeal, further evidence was taken, and on the 8th of November, 1900, the then Referee (Mr. Rankin, Q.C.) set aside the report and assessment. He held that though not technically binding upon him, he ought to follow the decision of the Supreme Court of Canada in *Sutherland-Innes Co. v. Romney* (1900), 30 S.C.R. 495, and that that decision was fatal to the right of the township of Rochester to initiate the work, which to a great extent related to a natural watercourse. He also thought that the assessment against the lands of the appealing townships was excessive and unjust.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 20th and 21st of March, 1901.

Matthew Wilson, K.C., for the appellants.

A. H. Clarke, for the respondents.

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September 21. ARMOUR, C.J.O.:—The principles which should have guided the engineer in making his report are simple enough, although the practical application of them is difficult enough.

Having estimated the total cost of the proposed drainage work, he should have estimated what it would have cost to put those parts of the Ruscomb and Silver Creek branch drains within the township of Rochester in the same condition in which they were when completed by the county council, and should have deducted this sum from the total cost as estimated, and should have charged it against the lands and roads in the township of Rochester which were assessed for the construction thereof by the county council, for that township was bound to keep those parts in repair and failed to do so.

He should then have ascertained the volume of water which, subsequently to the completion of those drains to their full extent by the county council, was artificially caused to flow from the lands and roads in each township, including Rochester, into those drains after their completion, and he should have charged the lands and roads in each township from which such volume of water was artificially caused to flow into those drains with the same proportion of the total cost (that is, the total cost less that portion thereof chargeable against lands and roads in the township of Rochester as above mentioned) which such volume of water bore to the whole volume of water artificially caused to flow from lands and roads in all the townships, including the township of Rochester, into those drains.

The learned Referee has held, following the judgment of Mr. Justice Gwynne in the Supreme Court in *Sutherland-Innes Co. v. Romney*, 30 S.C.R. 495, that the engineer had no power to assess for injuring liability any lands or roads for any part of the proposed work north of the junction of Silver Creek and Ruscomb River.

The construction placed by Mr. Justice Gwynne in that case upon the words "drainage work" in sec. 75 of 57 Vict. ch. 56 (O.), now sec. 75 of the Municipal Drainage Act, was in my opinion erroneous, and must have been arrived at by him by

his overlooking sec. 3 of that Act, now sec. 3 of the Municipal Drainage Act, to which he has not adverted.

That section provides that upon the petition of the majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners) as shewn by the last revised assessment roll to be the owners of the lands to be benefited in any described area within any township, incorporated village, town, or city, to the municipal council thereof, for the drainage of the area described in the petition by means of drainage work, that is to say, the construction of a drain or drains, the deepening, straightening, widening, clearing of obstructions, or otherwise improving any stream, creek, or watercourse, the lowering the waters of any lake or pond, or by any or all of the said means as may be set forth in the petition to the council, etc.

And thus in effect defines "drainage work" to mean the construction of a drain or drains, the deepening, straightening, widening, clearing of obstructions, or otherwise improving any stream, creek, or watercourse, and the lowering the waters of any lake or pond, and throughout the Act "drainage work" is used to signify each and every of these subjects, and as applicable to each and every of them.

I cannot, therefore, agree with the Referee in holding that the engineer had no power to assess for injuring liability any lands or roads for any part of the proposed work north of the junction of Silver Creek and Ruscomb River.

The engineer was not, however, guided in making his report by the principles above laid down, and his report could not therefore have been upheld by the Referee, and there was no sufficient evidence given on the appeal to the Referee to enable him, with the consent of the engineer, to amend the report so as to make it conform to these principles.

The Referee, in my opinion, went too far in directing that the proposed drainage work should be abandoned, and the township of Rochester should be allowed to initiate and carry on a fresh proceeding for the same purpose as the proposed drainage work.

And with these variations from the report of the Referee, this appeal will be dismissed with costs.

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OSLER, J.A. :—I think the appeal should be dismissed and the report or judgment of the Referee sustained. I do not think it is necessary to make any variation in his order. In my opinion he was right in holding that the assessment complained of could not stand, in the face of the recent decision of the Supreme Court in *Sutherland-Innes Co. v. Romney*, 30 S.C.R. 495, which he was bound by and ought to follow, as we are also bound to do. As I took no part in the judgment of this Court in that case, I am at liberty to say that I respectfully agree with the judgment of the Court delivered by Mr. Justice Gwynne, whose familiarity with the drainage laws of this Province, their growth and operation, is well known. Speaking for myself, I do not think that the judgment is open to the observations which have been made upon it in the course of the case now in judgment.

I think it is right to refer to the fact that a private Act was recently passed (1 Edw. VII. ch. 72) to validate and confirm the by-law and assessment in question in *Sutherland-Innes Co. v. Romney*, notwithstanding the judgment of the Supreme Court, as well as the by-laws of other townships in connection with the drainage scheme of which the Romney by-law and assessment formed part. The general law as to the construction of the clauses of the Drainage Act expounded in the judgment of the Supreme Court is left unchanged, and while reasons of policy and peculiar circumstances may have existed sufficient to invite the interference of the Legislature in this particular case, it cannot but be thought that, though we must not say that the Legislature was *inops consilii*, it was nevertheless *magnas inter opes inops* in permitting some of the recitals which are found in the preamble of the Act to appear there; such for example as the statement that the action in *Sutherland-Innes Co. v. Romney* was brought by a joint stock company owning lands in the township "and not engaged in agricultural pursuits but solely in the manufacture of cooperage stock," and setting forth the names of the Judges whose judgments were reversed by the Supreme Court and of the Judges who took part in the judgment of the latter Court, and of those who were absent and took no part in it. Statements of this kind have a novel appearance in the preamble even of a private Act, as it is, or

should be, impossible to suppose that the reasons suggested by them can have had any influence with the Legislature. There is, I believe, one precedent in Ontario legislation for counting the Judges when the object has been to nullify a decision, but the precedent is a vicious one and ought not to be followed.

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MACLENNAN, J.A. :—I am of opinion that this appeal fails. Since our judgment was pronounced upon the former appeal, the case of *Sutherland-Innes Co. v. Romney*, 30 S.C.R. 495, has been decided in the Supreme Court, in which it has been held that sec. 75 of the Drainage Act, under which the work here in question was initiated, only authorizes the maintenance or improvement of drains artificially constructed, and is not applicable to the case of a natural watercourse. The effect of that decision is that the report of the engineer was wholly unauthorized, and ought for that reason to be set aside.

The meaning of the expressions "injuring liability" and "outlet liability," and the circumstances under which they may arise under the Act, underwent very full discussion by the Court in that case, and our former judgment in the present case ought perhaps in some respects to be qualified by that discussion.

There is another ground on which, it appears to me, this appeal ought to fail. It appears from the evidence, and indeed from the engineer's report, that the part of the drainage work which it is proposed to enlarge, improve and extend, and which lies wholly within the township of Rochester, is out of repair, while the other townships have kept the parts of the work within their respective limits in repair. It is clear that the latter townships cannot be assessed for benefit, and, if at all, only for outlet or injuring liability. It would seem, therefore, that they have a right to require Rochester to put their part of the work in repair before calling upon the engineer to make an assessment for enlargement and extension, and to require the element of disrepair to be eliminated from the case upon which he is to exercise his judgment. It may be that when the work is put in a proper state of repair the supposed injury to lands and defect of outlet will, to a great extent, or perhaps wholly, disappear. The other townships are not obliged to submit to

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the engineer's estimate of the allowance which ought to be made for disrepair when, if Rochester did its duty, the case would be free from that embarrassment.

I think, for these reasons, the appeal should be dismissed, but I agree that the direction for the abandonment of the work should be struck out.

Moss, J.A. :—I agree that with the variation in the Referee's certificate proposed by the Chief Justice this appeal should be dismissed.

I think that without regard to our individual views as to the state of the law before the decision of the Supreme Court in *Sutherland-Innes Co. v. Romney*, 30 S.C.R. 495, we must now accept it as governing in similar cases arising under the same statutory enactments.

But I may be permitted to refer to the language of the Lord Chancellor in the recent case of *Quinn v. Leatham* (1901), 17 Times L.R., at p. 751, viz.: "There are two observations of a general character which I wish to make; and one is to repeat what I have very often said before—that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

In the present case the Referee rightly determined that effect should not be given to the engineer's report, but I think he went too far in directing the abandonment of the work.

I wish to add that I see no objection to a scheme of repair and extension being provided for in one by-law. It does not seem to me that an engineer need have any difficulty in separating the cost of the repairs from the cost of the extension work and properly apportioning the cost among the municipalities and lands lawfully chargeable. And I fear the adoption of the other mode would greatly increase the expense of the works.

LISTER, J.A. :—I agree that this appeal should be dismissed. The recent case of *Sutherland-Innes Co. v. Romney*, 30 S.C.R. 495, is, I think, conclusive against the right of the appellants to in any way assess lands in the respondent municipality for any part of the cost of the proposed work. Why sec. 75 of the Act should have been so framed as to make a difference between a purely artificial drainage work and one constructed in a natural watercourse, I am unable to perceive. It may be that the Legislature will, upon consideration, alter the language of the section so as to bring drainage works of the latter class within its provisions. I wish to add that I cannot assent to the view that a municipality failing to keep a drain within its own limits in repair, as required by sub-sec. 2 of sec. 70, must, before initiating proceedings for the doing of any of the works in relation thereto authorized by sec. 75, put the same in a condition of repair within the meaning of that sub-section. I think both classes of work may be authorized and provided for in a single by-law. In such case the engineer would estimate separately the cost of the two classes of work and assess the cost thereof against the lands properly chargeable therewith, distinguishing the cost of reparation from that for work to be done under sec. 75. To hold otherwise would, as it seems to me, impose unnecessary burthens upon municipalities.

Judgment varied.

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Lister, J.A.

[IN THE COURT OF APPEAL.]

C. A.

CHANDLER V. GIBSON.

1901

Sept. 21.

Will—Construction—Estate Tail—Estate for Life—R.S.O. 1897, ch. 128, sec. 30—Mistake of Title—Improvements—R.S.O. 1897, ch. 119, sec. 30.

A will made in 1877 by a testator who died in 1882, contained the following provision: "To my son, Moses, I give and bequeath fifty acres during his lifetime and then to go to his children, if he has any, but should he have no issue then to be equally divided among all my grandsons." Moses married after his father's death, and left children him surviving at the time of his own death:—

Held, that Moses took an estate for life with a remainder in fee to the children and not an estate tail.

Held, also, that a person who had purchased the land in question under the *bona fide* but mistaken belief that Moses took an estate tail was entitled to a lien for lasting improvements, the statute being held to apply to a mistake of title depending upon a question of law.

The point for determination in such a case is whether the person claiming for the improvements made them under the *bona fide* belief that the land was his own.

Judgment of Meredith, J., affirmed.

APPEAL by the defendants and cross-appeal by the plaintiffs from the judgment at the trial, the main question involved being the construction of a clause in a will, another somewhat similar clause of which was dealt with in *Re Chandler* (1889), 18 O.R. 105.

William Chandler died on the 4th of February, 1882, having, on the 18th of August, 1877, made his last will, the sixth clause of which was in these words:—"To my son Moses I give and bequeath fifty acres out of the north-west part of lot number twenty in the ninth concession of the township of Chatham, during his lifetime, and then to go to his children, if he has any, but should he have no issue, then to be equally divided among all my grandsons."

This son Moses remained a bachelor until after the testator's death. After that time he married and had two children, the plaintiffs, and he died on the 22nd of July, 1897, leaving a widow and the plaintiffs him surviving.

In the year 1886, the son purported to convey to the defendant Scane, in fee simple, the land in question in this action. The defendant Scane was a solicitor and he was aware of all the facts in connection with his grantor's title and was

of opinion that under the clause of the will in question his grantor took an estate in fee tail in the land in question, and he acted upon that opinion alone. The grantor intended to convey by his deed all the estate he had, and there was no fraud or misrepresentation or mistake of facts, and no warranty of title, the grantor covenanting against his own acts only. Scane went into possession and made lasting improvements on the land in question by which its value was enhanced, and he made them, as was found, in the belief that he had acquired a title in fee simple.

The plaintiffs brought this action in 1900 contending that their father had taken only a life estate and claiming possession of the land. Meredith, J., decided in their favour on this point, but held that the defendant Scane was entitled to compensation for his improvements.

The appeal and cross-appeal were argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 22nd of March, 1901.

Armour, K.C., and *M. Houston*, for the appellants. The word "children" has here the meaning of "issue": *Bowen v. Lewis* (1884), 9 App. Cas. 890; and if section 32 of the Wills Act applies, then the true interpretation is to give to Moses a fee simple absolute with an executory devise over to grandsons if Moses should die without issue. But as Moses did not die without issue he has always (in the event) had an estate in fee simple which he conveyed to the defendant Scane: Jarman on Wills, 5th ed., p. 522. If section 32 does not apply then Moses took an estate tail, and effectually barred it by the conveyance to Scane. The fact that Moses had no children at the time makes no difference, as it is a question of limitation of an estate. See *Bowen v. Lewis*, 9 App. Cas. 890; *Voller v. Carter* (1854), 4 E. & B. 173; *Raggett v. Beatty* (1828), 5 Bing. 243; *Mellish v. Mellish* (1824), 2 B. & C. 520.

Matthew Wilson, K.C., for the respondents. There is a distinct intention to give to Moses (a bachelor son) fifty acres during his lifetime, and that is the extent of the testator's bounty in his favour. Moses might or might not marry and have children. In the event of his having children, then the

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testator's bounty is not increased to Moses, and does not affect the life estate given to him, but a further or additional part of the testator's fee is given as a bounty to the children. In the event of Moses not leaving children, then this latter part of the fee is given to grandsons. In any event, the life estate goes to Moses. Then the remainder goes to one or other class according to the happening of a particular event; and either of these classes takes such remainder from the testator and not from Moses. See *Re Chandler*, 18 O.R. 105, and cases there cited. The defendant Scane should not have been given a lien for improvements upon the land in question. The deed conveyed a life estate; and improvements made during Moses' lifetime are referable to that estate which might have entitled Scane to possession for many years—far longer than the lifetime of the improvements—and the accident that Moses died prematurely does not entitle Scane to payment. This is not like the case of Scane being dispossessed during the lifetime of Moses; nor of improvements on land which Scane erroneously supposed his deed covered; nor of mistake in survey; nor of a defect in title arising from some irregularity in proceedings of which Scane was ignorant. Scane obtained a perfect title to the whole estate which Moses had. Admittedly, Moses had only a life estate; but Scane thought by virtue of the statute he could obtain by a conveyance executed by Moses a larger estate than Moses owned, and thereby defeat the children of Moses; and Scane's mistake was not in the title he had, but in the effect of that conveyance under the circumstances. Scane had full knowledge of all the facts and of the plaintiffs' title, and took his conveyance without any misrepresentation or concealment of facts; and it is submitted that there is no evidence whatever that he made lasting improvements under a *bond fide* mistake of title, and that he can no more claim for improvements made than Moses could have had if he had continued to own the estate conveyed to Scane. Scane obtained and improved a life estate. The plaintiffs are not claiming that estate but another estate which is in remainder. Scane owned the land (*i.e.* the life estate), but the statute provides for compensation for improvements on land which the party believed he owned, but did not own.

Armour, in reply. The statute applies to a mistake of law. *McKibbon v. Williams* (1897), 24 A.R. 122, and *Munsie v. Lindsay* (1886), 11 O.R. 520, are cases just like this one.

September 21. The judgment of the Court was delivered by Moss, J.A. :—This is an appeal by the defendants from the judgment of Meredith, J., delivered after the trial of the action, upon the ground that the learned trial Judge erroneously determined that the plaintiffs were entitled in fee to the lands in question, and a cross-appeal by the plaintiffs on the ground that the learned trial Judge should not have held the defendants entitled to an allowance for permanent improvements.

The first question is, what estate did Moses Chandler, the plaintiffs' father, take in the lands in question under the devise to him contained in the 6th clause of the will of his father, Wm. Chandler?

For the defendants, it is contended that under the will and the events which happened, Moses Chandler became entitled to an estate in fee, or, if not, that he took an estate tail. If he took an estate tail, it is not disputed that he duly barred the entail and conveyed the land in fee to the defendant E. W. Scane.

For the plaintiffs it is contended that the devise is to Moses for life with remainder in fee to his children, and that, upon the death of Moses, they became entitled to the fee in possession.

The learned trial Judge determined in the plaintiffs' favour, and I am of opinion that he reached the proper conclusion.

The will was executed in 1877, and the testator died in February, 1882. At these dates Moses was unmarried, but, after his father's death, he married, and the plaintiffs are the children of the marriage.

The provisions of the Wills Act, R.S.O. 1877, ch. 109, now R.S.O. 1897, ch. 128, apply to the will.

If, therefore, the 6th clause had said "To my son, Moses, I give and bequeath 50 acres . . . during his lifetime and then to go to his children, if he has any," and stopped there, it could scarcely have been argued that this was not a devise of the remainder in fee to any children that Moses might have.

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Before the Wills Act, these words would not have conferred more than a life estate upon the children; but, by section 30, the devise is to be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of unless a contrary intention appears by the will. Therefore, the words of devise to the children have, in this will, the same meaning as if they were "and after his death to his lawful children, if any, and their heirs."

And, so read, the children take as purchasers, so that Moses took an estate for life and not an estate of inheritance.

In *Bowen v. Lewis*, 9 App. Cas., at p. 905, Earl Cairns, speaking of the old law, says it is clear upon the authorities that, if there be a gift to children with words of division or inheritance, the children take as purchasers.

The question then arises whether, in the 6th clause, there appears any intention contrary to that of an estate in fee simple being given to the children of Moses. And that depends upon the effect of the latter words, viz., "but should he have no issue, then to be equally divided among all my grandsons."

It is contended that "issue" should be construed as "heirs of the body," and should control referentially the word "children," so that children should be read as meaning heirs of the body, and thus, by the operation of the rule in *Shelley's case*, give Moses an estate tail.

In *Jarman on Wills*, 5th ed., p. 1298, it is said: "It is well settled, also, that words importing a failure of issue (without the word 'such') following a devise to children in fee simple or fee tail, refer to the object of that prior devise and not to issue at large." And again at p. 1307: "That the words 'in default of issue,' or expressions of a similar import following a devise to children in fee simple, mean 'in default of children.' . . . This is free from all doubt."

These statements were expressly approved of and adopted by the Exchequer Chamber in *Foster v. Hayes* (1855), 4 E. & B., at p. 733.

The same conclusion was arrived at by the Court of Appeal in the converse case of a devise to one for life and after his decease to his lawful issue and their heirs forever, and if he should die without having any children born in wedlock, then

over: *Morgan v. Thomas* (1882), 9 Q.B.D. 643, and see *Kavanagh v. Morland* (1853), Kay 16, at p. 24.

The language of Earl Cairns in *Bowen v. Lewis*, 9 App. Cas. at p. 905, is in point: "I take it also to be clear upon the authorities that if you have a gift to children, with words of division or of inheritance, the children would take as purchasers; and then if you have a gift over in the event of death without issue, those words pointing to death without issue are to be construed referentially and to have their explanation from the gift to the particular individuals that you have had before."

This language covers this case and shews that, in the present instance, the words of the devise over to grandsons convey no contrary intention.

In *Maden v. Taylor* (1876), 45 L.J. Ch. at p. 572, Sir George Jessel, M.R., dealing with a similar question, says: "There the law is equally plain, that a gift to A. for life with remainder to his children in fee, and a gift over if he dies without issue, is an alternative gift, and means if there is no person to take under the previous gift of the fee, and consequently if I read it as I do read it in that way, I am not only in accordance with the authorities, but it appears to me I make the whole will consistent. Then it stands in this way: a gift to the nieces for life, with remainder to their children in fee, but if anyone has no children, or never had a child, so that nobody can take the fee, then to the surviving nieces also in fee; so that it appears to me that the context aids the construction I have given."

In this case, if the devise is to be read, as I think it must be read in view of the Wills Act, as a devise of the remainder in fee to Moses Chandler's children, the devise over must also be read as an alternative in case there is no person to take under the previous devise of the fee.

There are numerous cases in which it has been held that a general intent to give a devisee a larger estate than an estate for life overcame even an express gift for life, and in which the manifest general intent has prevailed over prior expressions leading to the contrary conclusion. But this has been when it was found impossible to confer all the interests it appeared to be the testator's intention to confer if the first taker was con-

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fined to a life estate. Here there is no such difficulty. In *King v. Evans* (1895), 24 S.C.R., at p. 364, the Chief Justice of Canada has pointed out that the doctrine of general intent overriding the particular intent is universally treated by modern authorities as exploded. As the law now stands, the words of devise to the children in this will are sufficient to pass the fee, and the devise to the grandsons is only to take effect in the event of Moses having had no children to take the estate.

There remains the question raised by the cross-appeal. The learned trial Judge found that after the making of the deed by Moses Chandler to the defendant Scane, the latter made lasting improvements on the land by which its value is enhanced, and made them under the belief that the land was his own—that he had acquired a title in fee simple to himself under the deed—and that the improvements were improvements he would not have made had he known that he had acquired an estate for the life of his grantor only.

Section 30 of the Act Respecting the Law and Transfer of Property affords a very extensive protection to a person who has made lasting improvements on any land under the belief that the land was his own, and “perhaps it may be called very advanced legislation to give a lien in every case to a person who has made improvements, even lasting improvements, on any land, under the belief that the land was his own”: *per* Wilson, J., in *Carrick v. Smith* (1874), 34 U.C.R., at p. 399.

The intention appears to me to be to make it a question in each case for the tribunal to determine whether the person claiming for the improvements made them under the *bonâ fide* belief that the land was his own: see *Carrick v. Smith*, 34 U.C.R. 389; *Smith v. Gibson* (1875), 25 C.P. 248; *Wyoming v. Bell* (1877), 24 Gr. 564; *O'Grady v. McCaffray* (1883), 2 O.R. 309; *Russell v. Romanes* (1879), 3 A.R. 635. And this may be found in his favour even though the mistake was one of title depending upon a question of law: *McGregor v. McGregor* (1880), 27 Gr. at p. 476. The right to a lien under such circumstances was conceded in *Evans v. King* (1894), 21 A.R. 519, out of which afterwards sprung *McKibbin v. Williams*, 24 A.R. 122.

I think the finding of the learned Judge is supported by the evidence, and I am of opinion that the award of compensation for lasting improvements ought not to be disturbed.

The appeal and cross-appeal should be dismissed without costs.

Appeal and cross-appeal dismissed.

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[IN THE COURT OF APPEAL.]

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Master and Servant — Negligence — Factories Act — Breach — Damages — New Trial.

Employing a girl under eighteen years of age to work between the fixed and traversing parts of a self-acting machine while it is in motion, in breach of the provisions of section 14 of the Ontario Factories Act, R.S.O. 1897, ch. 256, is in itself sufficient to render the master *prima facie* liable in damages for an accident which happens in the course of such employment, and negligence on his part directly conducing to the accident need not be shewn.

Roberts v. Taylor (1899), 31 O.R. 10, overruled.

Judgment of Street, J., 1 O.L.R. 18, reversed.

The Court being of opinion, however, that the damages awarded by the jury were excessive, directed that there should be a new trial unless the damages were reduced.

AN appeal by the plaintiffs from the judgment of Street, J., reported 1 O.L.R. 18, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 10th and 11th of April, 1901. The action was brought to recover damages in respect of an accident to the female plaintiff which occurred under the circumstances set out in the report below and in the judgments in this Court, and the chief question was whether the employment of the girl in breach of the provisions of the Factories Act was in itself *prima facie* evidence of negligence.

Thomas Mulvey, for the appellants. The violation of the Act is admitted; there is, therefore, a good cause of action. *Roberts v. Taylor* (1899), 31 O.R. 10, which the learned Judge has followed, is not rightly decided, for in that case it is attempted to qualify the absolute language of the statute and

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to introduce the elements of intelligence, strength, etc., as modifying circumstances. That case is inconsistent with *Groves v. Lord Wimborne*, [1898] 2 Q.B. 402, which is directly in point, and is not supported by the decisions upon which it purports to be based. In *Race v. Harrison* (1893), 9 Times L.R. 567, the child was not directed to work at moving machinery, but was hurt because of the unexpected starting of the machinery. In *Morris v. Boase Spinning Co.* (1895), 22 Rettie 336, there was deliberate disregard of instructions; while in *Lowcock v. Franklin Paper Co.* (1897), 169 Mass. 313, no statutory restriction was violated. That case went off on the question of the boy's intelligence, and in that respect is inconsistent with *Robinson v. W. H. Smith & Son* (1901), 17 Times L.R. 235. From the fact that penalties are imposed for violation of the Act it does not necessarily follow that there is no right of action. This question is fully considered in *Tompkins v. Brockville Rink Co.* (1899), 31 O.R. 124, and the distinction is pointed out that where, as in the present case, a statute is passed for the benefit of a particular class, any member of that class has a right of action in case of failure to observe the provisions of the Act. It is to be noted, too, that the penalty under this Act goes to the Province. If there is employment in violation of the provisions of an Act of this kind, and injury results in the course of that employment, there is *prima facie* actionable negligence: *Sharp v. Pathead Spinning Co.* (1885), 12 Rettie 574; *Queen v. Dayton Coal Co.* (1895), 95 Tenn. 458; *Morris v. Stanfield* (1898), 81 Ill. App. 264. It has been argued below on the other side that there was at most a violation of a negative restriction, and that such a violation does not give rise to a cause of action, but the cases already cited, and also, as particularly applicable to this point, *Salisbury v. Herchenroder* (1871), 106 Mass. 458, shew that there is no foundation for such a distinction. [The learned counsel also contended that, apart from the violation of the Act, there was evidence of negligence sufficient to justify the submission of the case to the jury.]

Dewart, K.C., for the respondent. There is no evidence of negligence, and unless the breach of the Act is a sufficient foundation for the action the plaintiffs must fail. That it is

not sufficient is apparent from a careful reading of the Act; there must be something more than mere disregard of its provisions. It deals with many questions, and if employment of a child under the age limit imposes liability, then employment during prohibited hours must also impose liability. But this leads to absurdity. The violation of the positive protective sections may well give rise to a cause of action, such as the neglect to guard dangerous machinery, and the cases relied on deal with accidents of that kind, but here the employment in violation of the Act was not in any sense the efficient cause of the accident, and some negligence must be made out. The fact that the person injured is under the age no doubt makes it the duty of the employer to shew that proper instruction was given, but with that instruction the question of age becomes immaterial: *Mellors v. Shaw* (1861), 1 B. & S. 437; *Hughes v. Macfie* (1863), 2 H. & C. 749. The findings of fact are conclusive on this point. The Act is not passed for the protection of children only, or of any particular class, and there is no private right of action. Moreover, under the Act the plaintiff is herself an offender, and on this ground is debarred from suing. If, however, the action is maintainable at all, evidence of the defendant's knowledge that he was violating the Act is essential, and that is wanting: *Rudd v. Bell* (1887), 13 O.R. 47. The plaintiff's own negligence was the cause of the accident, and the action was properly dismissed. Even if she is entitled to judgment, the damages are excessive and should be reduced.

Mulvey, in reply.

September 21. ARMOUR, C.J.O.:—The provision of the Ontario Factories Act, the contravention of which is invoked in support of this action, is contained in sub-sec. 3 of sec. 14 of that Act, and is as follows:—"A child or young girl shall not be allowed to work between the fixed and traversing part of any self-acting machine while the machine is in motion by the action of steam, water, or other machinery power."

A "young girl" is defined by the Act to mean a girl of the age of fourteen years and under the age of eighteen years.

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And by the Act a penalty for the contravention of this provision is imposed upon the employer of not more than fifty dollars with costs of prosecution, which penalty is to be paid by the convicting justice to the inspector, who is to forthwith pay the same over to the treasurer of the Province, to and for the use of the Province.

The female plaintiff was a young girl within the meaning of the Act, and was, in contravention of this provision, allowed to work between the fixed and traversing part of a self-acting machine in the defendant's factory while the machine was in motion by the action of electricity, and while so working had her hand crushed between the fixed and traversing part of the machine, necessitating amputation of her hand.

The learned trial Judge ruled that, apart from the question of the breach of the Ontario Factories Act, there was no evidence of negligence to go to the jury, and directed the jury to merely assess the damages, which they did at \$3000 to the female plaintiff and \$100 to the male plaintiff, and he afterwards determined that, notwithstanding the breach of this provision of the Ontario Factories Act, it was necessary to shew that the defendant was guilty of negligence in some respect directly connected with and which caused the accident, and that there was no such evidence, and he therefore dismissed the action.

The learned Judge held, as I understand his judgment, that the contravention of this provision by the defendant of itself afforded no evidence of negligence on his part, and that in order to make the defendant liable there must have been shewn negligence on his part conducing to the injury altogether apart from the contravention of this provision, and he also held that no action lay for the contravention of this provision.

The Legislature has in effect declared that a young girl is, by reason of her age, incompetent to work between the fixed and traversing part of any self-acting machine while in motion, and has therefore provided that she shall not be allowed to work in such manner, and the contravention of this provision was therefore in itself evidence of negligence on the part of the defendant to go to the jury, and ought to have been submitted to them as such: *Blamires v. Lancashire and Yorkshire R.W.*

Co. (1873), L.R. 8 Ex. 283; *Baddeley v. Earl Granville* (1887), 19 Q.B.D. 423.

The case of *Groves v. Lord Wimborne*, [1898] 2 Q.B. 402, is clear authority for holding that this action is maintainable for the contravention of this provision. That action was brought by a workman employed in a factory for personal injury occasioned to him through a breach by his employer, the occupier of the factory, of the duty to maintain fencing for dangerous machinery imposed upon him by sec. 5, sub-sec. 4, of the Factory and Workshops Act, 1878.

And no distinction can be drawn as to the application of the principle of that case between the Imperial Act then under consideration and the Ontario Factories Act, nor between the duty, the subject of the action in that case, and the duty, the subject of the action in this.

And, indeed, the principle established by that case is more easily applicable to the Ontario Factories Act than to the Imperial Act, because under the former the penalty imposed for the contravention of this provision goes absolutely to the Province.

And it was said in that case by Vaughan Williams, L.J., that "it cannot be doubted that when a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *primâ facie*, and if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty."

The whole object of the Ontario Factories Act was to provide for the performance by employers of certain prescribed duties for the benefit and protection of the workers in their factories, and there is nothing in the Act to shew that any worker in a factory for whose benefit and protection a particular duty is imposed upon his employer, and who is injured by the failure of his employer to perform such duty, may not maintain an action against his employer for such failure, which *primâ facie* he has the right to do.

The female plaintiff was injured by the failure of the defendant to perform his duty towards her by allowing her to

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work between the fixed and traversing part of a self-acting machine while in motion, and she is entitled to recover damages from him in this action, her injury being the direct result of such failure of duty on his part: *Gibb v. Crombie* (1875), 2 Rettie 886; *Sharp v. Pathhead Spinning Co.*, 12 Rettie 574; *Morris v. Stanfield*, 81 Ill. App. 264; *Queen v. Dayton Coal Co.*, 95 Tenn. 458; *Willy v. Mulledy* (1879), 78 N.Y. 310.

The effect of our decision is to overrule *Roberts v. Taylor*, 31 O.R. 10, which the learned trial Judge followed.

The damages assessed to the female plaintiff are, however, in my opinion, excessive, and there must be a new trial unless the female plaintiff will consent to reduce the damages to \$1,200, in which case the appeal will be allowed with costs, and judgment entered for her in the Court below for \$1,200, and for the male plaintiff for \$100, with full costs of suit. If, however, she will not consent, the appeal will be allowed without costs and a new trial had, the costs of the former trial to be in the discretion of, and to be disposed of by, the trial Judge.

OSLER, J.A.:—The plaintiff at the time of the occurrence which gave rise to the action was a young girl of about the age of sixteen years. She was employed by the defendant in a paper-box manufactory carried on by him. After she had been engaged for some time in doing work of a simple, safe, and, so far as she was concerned, legitimate character, she was set to work in the month of November, 1899, at a machine for stamping cardboard, a self-acting machine, moved and operated by machinery power, that is to say, by electricity. In the work at which she was thus employed, the operator was obliged from time to time to introduce her hand between the fixed and traversing part of the machine, and in some way—for it was impossible to discover exactly how it happened—while she was doing the work, her hand was caught in this part of the machine and so seriously injured that it was necessary to amputate it. The machine was not out of order or in any way defective or improperly constructed, and there was no evidence of contributory negligence on the part of the operator. Had the plaintiff been an adult, it must be said that

no actionable negligence or other ground of action was proved.

Her right to recover depends wholly upon the statute. She was a "young girl" within the meaning of sec. 2, sub-sec. 6, of the Ontario Factories Act, R.S.O. 1897, ch. 256, "An Act for the protection of persons employed in factories," and sec. 14, sub-sec. 3, of the Act enacts that "a child or young girl *shall not be allowed* to work between the fixed and traversing part of any self-acting machine while the machine is in motion by the action of steam, water, or other machinery power." Her employer was, therefore, clearly guilty of "a contravention" of this enactment, and whether she had been injured thereby or not, he became liable to the penalty imposed by sec. 39 of the Act. He contends that this is the only consequence of his breach of duty towards the plaintiff, and that, in the absence of proof that the injury she sustained was caused by some additional act of negligence on his part, no civil action lies, as it cannot be said that the mere breach of his statutory duty was the cause of the plaintiff's injury.

As regards the general scope or "purview," as it is sometimes called, of the Act, and whether it should be construed as giving, or rather as not depriving, a person who sustains an injury in consequence of a breach of its provisions, of a right of action or as restricting the remedy for the breach to the statutory penalty alone, the recent case of *Groves v. Lord Wimborne*, [1898] 2 Q.B. 402, is an important authority. It is a decision upon the somewhat analogous English Factory and Workshops Act, 1878. It was there held that an action would lie in respect of personal injury occasioned to a workman employed in a factory through a breach by his employer of the duty to maintain fencing for dangerous machinery imposed upon him by sub-sec. 4 of sec. 5, and that the penalty imposed by the Act was not the only remedy. In that case it was the absence of the required fencing or guard, and therefore some defect in the condition of the machinery, which led to the accident, but the point is that the action was held to lie not *quâd* an action for negligence but as an action for breach of the statutory duty imposed on the defendant. As Rigby, L.J., expressed it, at page 412: "Where an absolute duty is imposed upon a person by statute it is not necessary, in order to make

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him liable for breach of that duty, to shew negligence. Whether there be negligence or not, he is responsible *quâcunque viâ* for non-performance of the duty." The provisions of the Act were regarded as having been introduced for the protection from injury of a particular class of persons, and looking at the whole scope of the Act it was thought not reasonable to suppose that the Legislature intended the penalty to be the only remedy for injury occasioned by breach of the absolute statutory duty which it imposed.

All the considerations which were there thought to lead to this result apply quite as forcibly to many of the provisions of our own Act, but there is, moreover, the fact that, differing in this respect from the English Act, ours does not admit of any part of the penalty being diverted to the benefit of the injured person. The title of the Act proclaims its object. It is for the protection of workers employed in factories. They are the individuals around whom the Legislature has cast its protection, and they have a direct and immediate interest in such provisions as that in question, which are of the utmost consequence and value to them: *Vallance v. Falle* (1884), 13 Q.B.D. 109. Such a person, then, as the plaintiff, being a member of the class, might, as the plaintiff in this case did, sustain a serious injury from the deliberate contravention of the provisions in question, or she might sustain none, yet the maximum penalty which can be imposed in either case is \$50, and it is of no more benefit to her in one case than in the other. But, then, it is said that the defendant's breach of duty was not the proximate cause of the plaintiff's injury, and that some act of negligence or other breach of duty should have been proven, as that the machinery was actually in a defective condition or the absence of a guard, etc. With all respect, I cannot agree with this contention. There is a class of cases not resting upon any provisions of the Factory Act, of which *Grizzle v. Frost* (1863), 3 F. & F. 622, is an example, in which employers of young persons (in that case a girl of sixteen years) about dangerous machinery have been held liable for injuries sustained by them while working at it. The employer's liability in such cases is, of course, dependent upon considerations as to age and intelligence of the young person, the

absence of instructions or directions as to the use of the machinery and the employer's knowledge of its danger, but, given these in favour of the injured person, the employment upon the dangerous machine, in itself, it may be, perfect and safe for an adult to work it, is, under the circumstances, evidence of negligence sufficient to fix the employer with liability to the child or young person, though it would be otherwise in the case of an adult. See, also, *Race v. Harrison* (1893), 10 Times L.R. 92, reversing S.C. 9 Times L.R. 567. What the Legislature has now done is to declare, in effect, that it is unsafe for young persons, who may otherwise be lawfully employed in a factory, to work at such machinery as is described in sec. 4, sub-sec. 5, and that the employers under whom they are working, and who have the power, apart from the Act, to direct them what work they shall do in the factory, shall not allow them to work thereat. This prohibition is not complicated by any conditions as to the discretion or intelligence of the young person, or the sufficiency or otherwise of the instructions given to her, but is absolute.

It seems to me, then, that the Act places the employer who contravenes these provisions in the situation in which, apart from the Act, he would be liable to a young person in his employment for an injury sustained while working at dangerous machinery, and that an injury suffered by a young person as defined by the Act, caused by and while working at machinery which the Act forbids her employer to allow her to work at, may properly be said to be directly attributable to, and to be the result of, her employer's breach of duty towards her. I can see no difference in principle between the case of the workman who suffers an injury by reason of the employer's omission to comply with the requirements of the Act as to fencing and that of one who is injured while working at a machine at which, contrary to the express prohibition of the Act, her employer has set her to work. In both cases, it appears to me, that where contributory negligence is not proven, *i.e.*, that the plaintiff was the cause of his own injury, the proximate cause may be said to be the employer's breach of duty.

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The Act contains a great many other clauses, and imposes a great many other duties upon owners of factories. Some of these are of a less directly personal character as regards the workman than those dealt with in *Groves v. Lord Wimborne*, and in the case at the bar, and as to these I express no opinion.

On the whole, I am of opinion that the judgment at the trial should be reversed, and judgment entered for the plaintiff, with costs throughout. The money recovered by her must, of course, be paid into Court as required by Rule 840. The other plaintiff, the father of the injured girl, will also have judgment for the sum of \$100 assessed by the jury for his expenses, etc.

MOSS, J.A.:—The plaintiff Ethel Fahey, who is proved to be a young girl within the meaning of the Ontario Factories Act, was engaged by the defendant to work at “stripping,” as the process of trimming the rough edges of cardboard for boxes is termed. This work she might properly be engaged in, and her employment for that purpose was not a contravention of the provisions of the Factories Act. But after she had been engaged in this way for a time, she was put to work at a machine for stamping the cardboard. In feeding and running this machine, she was working between the fixed and traversing parts of a self-acting machine while it was in motion by the action of machinery power from electricity. The working of it is attended with danger to any one not well versed in the handling of it. On the 15th of December, 1899, she was directed by the defendant’s foreman to work at the machine, and while doing so her left hand was caught between the moving or traversing plate and the stationary bed to which the stamping die is attached, and was badly crushed and cut, so as to require amputation. The action is for damages for the injury thus sustained. The right to maintain the action is put upon the provision of sub-sec. 3 of sec. 14 of the Factories Act. The contention is that by allowing the plaintiff to work between the fixed and traversing part of this machine the defendant was guilty of a breach of sub-sec. 3, and is liable for the injury to the plaintiff.

The learned trial Judge was of the opinion that, assuming that the employment of the plaintiff upon the machine in

question was a breach of the provisions of sub-sec. 3, it was still necessary under the authorities to shew that the defendant was guilty of negligence in some respect directly connected with and which caused the accident, and there being, in his view, no such evidence, he dismissed the action.

I understand his view to be that in order to give rise to a cause of action for the injury in this case, the defendant must have been guilty of some negligence in connection with the nature or construction of the machine or the proper guarding of it or the proper working of it, quite apart from the mere act of allowing a young girl to work it. In other words, if the machine was in perfect working order, and one perfectly proper to be worked by a man or woman, the defendant cannot be held responsible in damages to a young girl whom he allowed to work at it to her injury. The learned Judge also found that the plaintiff had been carefully instructed and her capacity tested before she was put to work, that she evidently understood how to manage it, and could not fail to see the danger of injury in case she allowed her hands to be caught, which was the only danger she ran in working it. The plaintiffs complain of these findings, and submit that it should have been left to the jury to say whether or not the plaintiff Ethel was fully instructed. But it appears to me that whether she was instructed or not is immaterial. The prohibition is against allowing a young girl to work at such machinery. This means any girl between the ages of fourteen and eighteen years, and does not mean an uninstructed girl or a not fully instructed girl. The intention of the Legislature, expressed in sub-sec. 3, is to prevent young girls from being allowed to engage in any work which involves working between the fixed and traversing parts of a self-acting machine while in motion by the action of its motive power, just as the intention under sub-sec. 1 is to prevent a child from cleaning a fixed part of a machine while the other parts are in motion, even though the cleaning of the particular part be not dangerous: *Pearson v. Belgian Mills Co.*, [1896] 1 Q.B. 244.

The real question is whether the undoubted breach by the defendant of the provisions of sub-sec. 3 of sec. 14, in allowing

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this young girl to work the machine in question, renders him liable in damages for her injury.

It can scarcely be doubted that he became liable to a penalty under sec. 39 of the Act. But does that exempt him from all other liability? No provision similar to sec. 82 of the Imperial Factories and Workshops Act, 1878, for applying any portion of a fine for the benefit of the injured person is contained in the Ontario Factories Act. Special penalties are provided for breach or contravention of some provisions of the Act, but these do not apply to sec. 14.

The policy of the Act is to provide for the health and safety of workers employed in factories and workshops. One set of sections deals with sanitary precautions, and makes provision for protecting the health of the workers. Another set deals with protection against accidents, and makes provision for safety against injury. Sec. 14 falls within the latter class, and is intended to protect young and inexperienced workers from accident and injury. It contemplates the employment of children, young girls, and women in factories, but it casts upon their employers the duty of not allowing any employee of the specified classes to engage in the prohibited occupations. This duty the defendant owed to the plaintiff Ethel Fahey as an employee under his charge. By allowing her to work the machine in question, he rendered himself liable to a fine under sec. 39, even though no injury had resulted to her. As said by A. L. Smith, L.J., in *Groves v. Lord Wimborne*, [1898] 2 Q.B. 402, at p. 408, the fine is inflicted by way of punishment of the employer for neglect of the duty imposed by the Act, and must be proportionate to the character of the offence. He adds: "This consideration, and the fact that whatever penalty the magistrates inflict does not necessarily go to the injured workman or his family, leads me to the conclusion that it cannot have been the intention of the Legislature that the provision which imposes upon the employer a fine as a punishment for neglect of his statutory duty, should take away the *prima facie* right of the workman to be fully compensated for injury occasioned to him by that neglect."

In allowing the plaintiff Ethel Fahey, while under his charge as an employee, to work the machine in question, the

defendant neglected the duty towards her which the statute imposes upon him. The work for which he primarily engaged her was not an improper employment for her. But by the defendant's action she was removed from it and directed to engage in a work which the Act expressly declares she should not be allowed to be employed at.

It appears to me that this breach of an unqualified statutory obligation was the direct cause of the plaintiff's injury. Whether the defendant's conduct is to be classed as negligence or as a breach of a statutory duty resulting in injury, does not seem to me to be very material. I think the plaintiffs have made out a good cause of action under the statute.

With regard to the amount of damages, I agree that they are excessive, and unless the plaintiffs agree to reduce the amount awarded to Ethel Fahey to \$1,200, there should be a new trial.

MACLENNAN, and LISTER, J.J.A., concurred.

Appeal allowed.

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Sept. 21.

PATTERSON V. FANNING.

Negligence—Highway—Horse.

The defendant's horse strayed from his field to the highway, the fence being defective, and, being frightened by a boy, ran upon the sidewalk and knocked down and injured the plaintiff. A municipal by-law made it unlawful for any person to allow horses to run at large:—

Held, that the horse was unlawfully on the highway and that the defendant was liable in damages for the injury suffered by the plaintiff, the injury being the natural result of, and properly attributable to, his negligence.

Judgment of a Divisional Court, 1 O.L.R. 412, affirmed.

AN appeal by the defendant from the judgment of a Divisional Court, reported 1 O.L.R. 412, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 13th of June, 1901.

E. F. Lazier, for the appellant.

Washington, K.C., for the respondent.

September 21. ARMOUR, C.J.O.:—The by-law of the city of Hamilton making it unlawful for any person to allow his horses to run at large within that city was plainly admissible in evidence to shew that the defendant's horses, at the time the female plaintiff was injured by one of them, were unlawfully running at large, and that the defendant was a wrongdoer in allowing them to so run at large.

The learned trial Judge was therefore in error in rejecting it, and as it is now produced properly authenticated, I think it ought to be admitted in evidence.

If, but for this by-law, the defendant's horses were lawfully at large upon the public highway, as would seem to be the necessary deduction from the language of the Chancellor in *Ricketts v. Markdale* (1900), 31 O.R. 610, it would be difficult to uphold the recovery in this case without shewing that the female plaintiff was injured by some vicious propensity of the horse of which the defendant was aware.

In *Cox v. Burbidge* (1863), 13 C.B.N.S. 430, Williams, J., said: "I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the

right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." See also *Blacklock v. Millikan* (1853), 3 C.P. 34; *Mason v. Morgan* (1865), 24 U.C.R. 328; *Lee v. Riley* (1865), 18 C.B.N.S. 722.

The effect of this by-law being in existence was, in my opinion, that the same liability was imposed upon the defendant in allowing his horses to run at large upon the public highway as would have been imposed upon him at the common law had he allowed his horses to stray into the land of his neighbour without the default of his neighbour; that he was bound to take care that his horses did not run at large upon the public highway, and that he was answerable for the consequences of their doing so.

In *Cox v. Burbidge* it was not shewn, as in this case, that the horse was unlawfully upon the highway as against the public, and in *Chase v. McDonald* (1875), 25 C.P. 129, the Chief Justice, delivering the judgment of the Court, expressly says: "The horse may be a trespasser on the road and the owner responsible therefor."

For these reasons I would dismiss the appeal with costs.

OSLER, J.A.:—The case was that the defendant's horses escaped from the field, in which they were pasturing, into the highway through a defective fence. Being on the highway, they were startled by a boy, and, running away, went upon the sidewalk where the plaintiff was walking, and knocked her down.

The question is what liability, if any, attaches to the plaintiff for the damage thus caused. The case is different, in my opinion, from that of a horse biting or kicking a person on the street under such circumstances. The horses were on the highway, where, it is conceded, that they had no right to be unattended and at large. They were, moreover, on a part of the street appropriated to the use of foot-passengers, and were there in consequence of the neglect of the defendant to keep up his fences, and the damage was just such as might naturally

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and reasonably be expected to be caused by horses running along the street uncontrolled. It seems to me, therefore, that in proving this the plaintiff has proved all that is necessary to maintain the action. I think that is the result of the authorities, though it cannot be denied that expressions are to be found in them indicating some want of harmony in laying down a clear general principle.

It is not necessary, nor is it in my view accurate, to speak of the horses as being trespassers on a street, the whole title to which is in the public, either the crown or the municipality. That would give the plaintiff no right of action, though it might subject the owner to some form of prosecution by way of indictment for a nuisance or for infringement of the municipal by-law against such animals being allowed to run at large. It is enough to say that they were unlawfully on the street in consequence of the negligence of the owner, and that the damage suffered by the plaintiff was the natural result of, or properly attributable to, such negligence, having been caused by just what horses would be likely to do under the circumstances. The gist of the action is not trespass but negligence, and therefore, in considering whether the defendant is to be liable for the damage, we must see that it is such as might reasonably be expected to follow the negligent act.

The defendant relied upon *Cox v. Burbidge*, 13 C.B.N.S. 430, in support of his contention that he would not be liable without proof of a *scienter* on his part that the horses were of a vicious or dangerous disposition. That case, however, is readily distinguished from the present. In the first place, there was no proof of negligence on the defendant's part. It was not shewn how the horse got upon the street. The single fact found was that he was on the highway, and he might have got there without any negligence of the owner. He might have been sent there by a stranger, or might have escaped from some enclosed place without the owner's knowledge. And, in the second place, even if negligence had been proved, it was not shewn to be connected with the damage complained of. As Erle, C.J., said during the argument, the question was whether the owner of an animal *mansuetæ naturæ* was liable for an unexplained kick. And, in the judgment: "Everybody knows

that it is not at all the ordinary habit of a horse to kick a child on a highway." Therefore, in the absence of knowledge on the part of the owner of the vicious nature of the animal, he would not be liable for a sudden act of a fierce and violent nature contrary to its usual habits.

Chase v. McDonald, 25 C.P. 129, relied on in the judgment at the trial, is a decision on demurrer on facts similar in effect to those in *Cox v. Burbidge*, and follows that case. It is unnecessary for the plaintiff to invoke the decisions in *Lee v. Riley*, 18 C.B.N.S. 722; *Ellis v. Loftus Iron Works Co.* (1875), L.R. 10 C.P. 10, and cases of that class, which were really actions for trespass committed in the plaintiff's close by the defendant's horse. They do not govern such a case as the present. They turn upon the principle enunciated by Williams, J., in *Cox v. Burbidge*, at p. 438, viz.: "If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." Approved by Blackburn, J., in *Fletcher v. Rylands* (1866), L.R. 1 Exch. 265, 281. To the same effect is Addison on Torts, 6th ed., p. 129: "Where an animal is a trespasser, it is immaterial that an injury done by it is due to the animal's vice. The owner in such a case is liable for all the damage it may do, whether the damage is such as may reasonably be expected from the nature of the animal or is due to mischievous propensities of which the owner is ignorant." See also *Mason v. Morgan*, 24 U.C.R. 328; Pollock on Torts, 4th ed., pp. 40, 41, 449, 544; *Fallon v. O'Brien* (1880), 12 R.I. 518. I refer also to Glegg's Law of Reparation (1892), pp. 299, 301.

It may be added that the passage cited in the Court below from the 5th edition of Addison on Torts as to *Lee v. Riley*, and *Ellis v. Loftus Iron Works Co.*, being inconsistent with the case of *Cox v. Burbidge*, has been omitted, and, I think, discriminately, from the 6th edition of that work: *loc. cit.*

Further reference may be made to *Daniels v. Grand Trunk R.W. Co.* (1885), 11 A.R. 471, and to a well-considered case of

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Healey v. Ballentine (1901), 49 Atl. Rep. 511, in which the principal English authorities are discussed.

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On the whole, I am of opinion that the judgment should be affirmed.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

Appeal dismissed.

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DANA V. McLEAN.

Bankruptcy and Insolvency—Assignments and Preferences—Presumption.

Oct. 16.

The statutory presumption of the invalidity of a preferential transfer of goods is rebutted by shewing that it was entered into by the transferee in good faith and without knowing, or having reason to believe, that the transferor was insolvent.

Judgment of Falconbridge, C.J., affirmed on other grounds.

APPEAL by the plaintiff from the judgment at the trial.

The plaintiff was the assignee for the benefit of the creditors of A. C. McCrady & Sons, and brought the action to set aside a transfer of goods made by them to the defendants under the circumstances stated in the judgments.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 29th of May, 1901.

Aylesworth, K.C., for the appellant.

Whiting, K.C., for the respondents.

October 16. ARMOUR, C.J.O.:—The facts, as I think they ought to be found, are as follow: The defendants, a firm doing business in Ottawa, on the 3rd March, 1900, sold to A. C. McCrady & Sons, a firm doing business at Brockville, 4000 sheep pelts at \$1.12½, the former firm being informed at the time that the latter firm had sold 2000 of these pelts to one Munro, of Carleton Place, at an advance of three cents per pelt,

and on the 5th March, 1900, the defendants shipped these pelts by the orders of A. C. McCrady & Sons to them at Brockville by the Ottawa, Arnprior and Parry Sound Railway, and sent the bill of lading to them, and on the 6th March, 1900, sent them the following invoice:—

Ottawa, 5th March, 1900.

A. C. McCrady & Sons, bought of
H. McLean & Co.

Terms cash.

2000 to Brockville.

2000 to Quebec.

To 4000 sheep pelts at \$1.12½.....	\$4,500.00
Collection charge.....	8.45

\$4,508.45

By draft at sight sent for collection..... \$4,508.45

enclosed in the following letter:

Ottawa, 6th March, 1900.

Messrs. A. C. McCrady & Sons,
Brockville.

Dear Sirs,

Enclosed herewith we hand you our invoices for the pelts shipped to Quebec and Brockville yesterday amounting to \$4,508.45. The bill of lading went forward yesterday. We have made draft as usual for the amount, which kindly honour on presentation, and oblige.

And on the 5th of March, 1900, the defendants drew the following draft:—

Ottawa, 5th March, 1900.

At sight pay to the order of the Bank of Ottawa forty-five	
\$4500 hundred and eight $\frac{45}{100}$, and charge to account of	
8.45	H. McLean & Co.

\$4508.45

To A. C. McCrady & Sons,
Brockville.

This draft was accepted by A. C. McCrady & Sons on the 10th of March, 1900, payable at the Molsons Bank, and was

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protested for non-payment on the 13th of March, 1900. On the 6th of March, 1900, A. C. McCrady & Sons drew the following draft :—

Brockville, Ont., March 6, 1900.

\$2334

Thirty days after date pay to the order of ourselves at twenty-three hundred and thirty-four dollars value received, and charge to account of

A. C. McCrady & Sons.

To D. Munro,

Carleton Place.

which draft was indorsed by the drawers.

And on the 7th of March, 1900, A. C. McCrady & Sons sent the following invoice to D. Munro, Carleton Place :—

A. C. McCrady & Sons, Wool Pullers.

Brockville, March 7, 1900.

Sold D. Munro, Carleton Place.

Terms 30 days.

Dr.

2000 G.S. sheep pelts, \$1.12½.....	\$2,250.00
Interest.....	60.00
Freight.....	24.00

\$2,334.00

Shipped from Brockville.

The goods arrived by Grand Trunk at Brockville on the 8th or 9th of March, and A. C. McCrady & Sons were notified of such arrival, and thereupon re-shipped them to D. Munro, Carleton Place, to which place they went in the same car in which they arrived at Brockville, but over a different railway, and they sent the bill of lading to Munro with the invoice.

On the 15th of March, 1900, the defendants got notice of the protest of their draft on A. C. McCrady & Sons, one of that firm being present at the time, who, after telephoning to his firm at Brockville, assured them that the draft would not come back but that it would be arranged, and on the following day the defendants, finding that the draft had come back, one of them, Mr. Macdonald, went to Brockville and on the 17th saw one of the firm of A. C. McCrady & Sons, who went with him to the bank intending to give him a marked cheque for the

amount of the draft, but the banker refused to discount certain paper which he desired to discount, and which it was necessary should be discounted to enable him to give the cheque, and Macdonald then learned that Munro had refused to take the goods or to accept the draft drawn on him for the price. Macdonald then had some conversation with the banker, the effect of which was to allay any suspicion he might have had as to the solvency of A. C. McCrady & Sons, and he swore at the trial that he had no suspicion that they were not solvent.

It was then suggested by this member of the firm of A. C. McCrady & Sons that, as Munro had refused to take the goods and as he did not know where to place them, the defendants should take the goods back, to which Macdonald agreed, and the following invoice was made out:—

A. C. McCrady & Sons, Wool Pullers.

Brockville, Ont., March 17, 1900.

Sold to H. McLean & Co.,

Ottawa.

400 bales, 2000 sheep pelts, \$1.12½..... \$2,250.00

Less frgt. as charged by railway, say..... 50.00

\$2,200.00

Recd. payment,

A. C. McCrady & Sons.

and was given to Macdonald.

On the 19th—Monday—Macdonald was again in Brockville, and asked this member of the firm of A. C. McCrady & Sons for the bill of lading to Munro, and this member of the firm telephoned to Munro for it, who sent it, and it was given to Macdonald, who went to Carleton Place and shipped the goods thence to his firm at Ottawa. And on the 24th of March, 1900, A. C. McCrady & Sons made an assignment to the plaintiff under R.S.O. 1897, ch. 147, who thereafter brought this action which was tried by Falconbridge, C.J., at Brockville, on the 17th of September, 1900, and was dismissed with costs.

The sale of the goods was, in my opinion, made to A. C. McCrady & Sons by the defendants, and the property in the goods passed to them, and when the goods arrived at Brockville, which was their destination, and were re-shipped by A. C.

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McCrady & Sons to Munro, the purchaser, or supposed purchaser, from them, the *transitus* was at an end, and there was no longer any right of stoppage *in transitu*, and the parties did not act in that view.

The transaction must be treated, the property having passed to A. C. McCrady & Sons, as a transfer by them to the defendants of the goods in satisfaction of what they owed the defendants for the goods.

And this transaction is assailed as being in contravention of the Act, R.S.O. 1897, ch. 147, as having the effect of giving the defendants a preference over the other creditors of A. C. McCrady & Sons, and as being *primâ facie* presumed to have been made with that intent, A. C. McCrady & Sons having made their assignment for the benefit of creditors within sixty days thereafter.

But I think that this *primâ facie* presumption has been rebutted in this case, for I find that this transaction was entered into and consummated by the defendants in perfect good faith, and without knowing or believing, and without any reason to know or believe, that A. C. McCrady & Sons were at the time in insolvent circumstances, as they undoubtedly were.

When the transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor, or over any one or more of them, if the debtor within sixty days after such transaction makes an assignment for the benefit of his creditors, this circumstance of itself alone raises an implication that the transaction was made with intent to give such creditor a preference over his other creditors, or over any one or more of them, but this implication is merely a *primâ facie* one arising from that fact alone, and may be rebutted by evidence from which the conclusion may be drawn that there was no such intent, and this, in my opinion, is the proper construction to be placed upon the statute.

And putting this construction upon it, my conclusion is, from the evidence in this case, that there was no such intent in this case.

And I would dismiss the appeal with costs.

OSLER, J.A. :—This judgment cannot, in my opinion, be supported on the ground on which the learned trial Judge has placed it, viz., that there was a sale to Munro, and that the goods were stopped *in transitu* before delivery by the carrier. The evidence clearly shews that there was no sale to Munro, and if there was no sale to him and none to McCrady & Sons, as the learned Judge also holds, no question of stoppage *in transitu* arises; the defendants simply took their own.

But all the documents in the case and the conduct of the parties shew that McCrady & Sons were really the purchasers of the skins in question from the defendants. They supposed, possibly, that they had re-sold them to Munro, or rather, hoped that he would accept them on the terms they proposed, though it turned out that he would not, and was never bound to do so. They were invoiced by McLean & Co. to McCrady & Sons, as the purchasers, at Brockville, their place of business, and they drew upon them, as purchasers, for the price, and in their turn they purported to act as vendors in their ineffectual transaction with Munro. When that fell through, they in form re-sold to the defendants, undoing the bargain they had made with them. The sole question then is whether as against the plaintiff, the assignee of McCrady & Sons, the latter transaction can be supported, having regard to the provisions of the Assignments and Preferences Act, as it took place within sixty days before the execution of the assignment.

The transaction undoubtedly had the effect of discharging McCrady & Sons' debt to McLean & Co., and thus of giving the latter a preference over the other creditors of the former.

The presumption of an intent to prefer which, having regard to the date, is made by the Act, is now merely a *prima facie* presumption, and is rebuttable. Has it been rebutted or disproved? There is evidence that McCrady & Sons were in fact insolvent and unable to meet their just debts as they became due when they re-sold to McLean & Co., but it is not proved that Macdonald knew they were insolvent.

It is proved rather that he believed they were not insolvent, relying upon the statement made to him by their banker. The evidence leads to the further conclusion that he was aware that the source from which they expected to pay him for the skins

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was the sale expected to be made to Munro, and that this falling through, he was willing to relieve them from their liability to him, and, to carry out that intention, resumed the ownership thereof in good faith. These concurrent facts, it appears to me, may well be taken to rebut the existence of any intent on his part to do so by way of obtaining a preference. The assignee's attack upon the transaction therefore fails, and the appeal must on this ground be dismissed and the judgment affirmed.

MACLENNAN, J.A. :—The form of the documents in this case would indicate a sale by McLean & Co. to McCrady & Sons, but the oral evidence, believed by the learned Chief Justice, and not contradicted, is that as between those parties the transaction was one of agency only, and that the sale, if any was, and was intended to be, to Munro. There are several indications in the documents themselves that such was the real nature of the transaction, and the desire of McCrady & Sons to conceal from Munro that the goods he was buying were McLean & Co.'s goods, explains the form which the business assumed. The price agreed upon, viz., \$1.12½ per pelt, is the same in McLean & Co.'s bill to McCrady & Sons, as in McCrady & Sons' bill to Munro, to which is added in the latter \$24 for freight and \$60 called interest, but explained to be the three cents per pelt which was McCrady & Sons' commission. There seems to be no other reasonable explanation of the form of the bill to Munro and the \$60 item, than that Macdonald's evidence is true, and that they were dealing with McCrady & Sons as commission agents, and that the intended sale was one by McLean & Co. to Munro.

The learned Chief Justice, after hearing the witnesses, was very clearly of that opinion, and says, "There is no question about the understanding of the parties on the subject."

The purchaser having refused to take the goods, the property remained in McLean & Co., and all that remained was to adjust the relations between them and their agents. The latter had accepted a bill for the goods, and it became a question whether they would keep the goods and pay the bill, or let the respondents get back the goods. It was ultimately agreed that they should get back their goods. The sale to

Munro having fallen through, McCrady & Sons did not want the goods for themselves.

It may be that the respondents might, if they had chosen to take that position, have compelled McCrady & Sons to pay their draft, notwithstanding that the sale to Munro had fallen through, but it is not necessary to determine that question. They did not insist upon that, but took back the goods.

I am of opinion that the appeal should be dismissed.

MOSS, and LISTER, JJ.A., concurred with ARMOUR, C.J.O., and OSLER, J.A

Appeal dismissed.

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IN RE McMASTER ESTATE ASSESSMENT.

Assessment and Taxes—Exemptions—Trustees—Income.

Under sec. 46 of the Assessment Act, R.S.O. 1897 ch. 224, the income derived from property vested in trustees must be regarded for the purpose of assessment as their own income, and is subject to assessment although the trustees have no personal interest in it. Its ultimate destination and mode of expenditure are immaterial, and the obligation of the trustees to pay it to the beneficiaries is not a debt to be offset against it.

Quere, whether the amendment to the section by 63 Vict. ch. 34, sec. 3 (O.), affects the question.

Judgment of McDougall, Co.J., affirmed.

CASE stated by His Honour the Judge of the county court of York under the Assessment Act.

The point in question is stated in the following judgment:—

MCDUGALL, Co.J.:—This is an appeal by the trustees of the estate of the late Honourable William McMaster, who are residents of Toronto, from the assessment by the city of Toronto of the income coming to their hands, as such trustees, derived from the investment by them of the principal moneys realized from the said estate or arising from the unrealized outstanding assets. By the terms of the will of the late Hon. William McMaster all his estate (save his private residence and its contents, which his wife was to be allowed to occupy during her pleasure, but at her death, or when she so ceased to reside therein, the residence and contents should form part of his estate), was bequeathed to his trustees in trust to call in, convert, realize, sell and dispose of as they in their discretion deemed best, and after payment thereof of debts and funeral and testamentary expenses, and a large pecuniary legacy to his nephew, to hold the balance of the proceeds, subject to the payment of certain annuities, as an endowment for McMaster University. The will further recites that until the death of the annuitants, or their refusal to accept payment of their annuities, the trustees should invest the balance of the proceeds realized from his estate, after payment of debts and the specific legacy to his nephew, in such securities as the trustees should think

proper, subject to the supervision of a committee on investments to be appointed by the board of governors of the said university.

The will then directs that out of the income arising from such investments certain annuities should be paid to his wife and several other persons, and the balance of such income, after payment of all necessary expenses and outgoings, it directs should be paid over from time to time as the same should come into the hands of the trustees, to the board of governors of McMaster University, to be by them employed for the promotion of the work of the said university, requesting, however, the board of governors to devote not less than \$14,500 per annum to the Toronto Baptist College, as the faculty of theology of the said university. After the death of the annuitants, or their refusal to accept their annuities, the will directs that the principal funds should be transferred directly to the McMaster University corporation, subject to a charge thereon of \$2000 a year in favour of the regular Baptist Missionary Society of Ontario. Several of the annuitants are still living, and, consequently, the principal funds constituting the estate are still vested in the trustees, who manage the same and annually pay over the income to the annuitants and the balance thereof to the university. The net income coming into the hands of the trustees last year was \$30,324.85. Of this amount, it is stated by the trustees that \$8,504.16 consists of rents arising from real estate in their hands, and the balance is interest from mortgages and other investments. They paid out of income last year to the annuitants \$7,400, and to the university \$22,924.85. The trustees contend that I must regard this \$22,924.85 as part of the income of McMaster University, and state that if the accounts of the university are taken, it will appear that the university has no taxable income, because the proper annual expenditure of the university equals or exceeds their gross revenue from all sources, including in such income this \$22,924; that, as the university would not be assessable for any sum whatever, that portion of their income coming to them from the endowment fund at present vested in the trustees, is not assessable in the hands of the trustees. They urge that the salaries of the university staff paid by the university out of its general income (the major part of which

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consists of the moneys annually paid to the university by the trustees) pay a municipal tax already, the professors, lecturers, etc., being individually assessed by the city on their several annual stipends. If this portion of the university income should be held to be assessable in the hands of the trustees, it is tantamount, it is said, to a double assessment. I need not point out that this contention is untenable. The professors and lecturers are taxed under sec. 35 of the Assessment Act as individuals upon their respective incomes. Their liability to taxation has nothing whatever to do with the liability to taxation of either McMaster University or the trustees, the present appellants.

Can I take cognizance in any case of the destination of income in determining the liability of trustees to be assessed for income? The apparent intention of the Assessment Act is to ignore the existence of trusts, and to treat for the purposes of the Act the person actually holding or controlling the personal property as the actual owner of the property. Sec. 46 of the Assessment Act states that personal property in the sole possession or under the sole control of any person or trustee, guardian, executor, or administrator, shall be assessed against such person alone. Sub-sec. 2: "Where a person is assessed as trustee, guardian, executor, or administrator, he shall be assessed as such, with the addition to his name of his representative character, and such assessment shall be carried out in a separate line from his individual assessment, and he shall be assessed for the value of the real and personal estate held by him, whether in his individual name, or in conjunction with others in such representative character, at the full value thereof, etc., etc."

In the case of personal property of non-resident owners, sec. 44 declares that it "shall be deemed to be the individual property of such agent, trustee, or other person, for the purposes of this Act."

If, then, the personal property vested in the appellants as trustees is to be considered for the purposes of the Assessment Act as the property of the trustees, the income arising therefrom is the income of the trustees for the like purpose. As to the strictness of construction to be put upon taxing Acts, I

cannot do better than to cite a sentence or two in the judgment of Earl Cairns in *Partington v. Attorney-General* (1869), L.R. 4 H.L. 100, at p. 122: "As I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

It is not open, therefore, for me to apply any equitable construction to this statute if the language is plain. I think the language is clear that personal property (which includes income) vested in or under the control of trustees, as in this case, must be regarded for the purpose of assessment as their own property, and the income as their income. The trustees, as such qualified owners, are of course entitled to the usual exemption allowed by the statute. This will be so much of the annual income as arises from rents from real estate, and the \$400 allowed upon all incomes derived from any source other than personal earnings.

The case was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 1st of April, 1901.

Thomson, K.C., for the trustees.

A. F. Lobb, for the city of Toronto.

September 21. The judgment of the Court was delivered by OSLER, J.A.:—The property out of which the income, which is the subject of the assessment in question, is derived is vested in the appellants as trustees under the will of the testator. The income comes into their hands in the course of the management of the estate, and they are bound to apply it in accordance with the directions of the will for the purposes of a university known as McMaster University. They contend that this income is not taxable. The assessment was for the year 1899, and the County Judge, on the appeal of the trustees from the court of revision, having confirmed the assessment, a case has been submitted to this Court by Order in Council of the 13th

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of March, 1900, pursuant to sec. 85 of the Assessment Act, by way of appeal from his decision.

At the conclusion of the argument it became manifest that the appeal was entirely without foundation, having regard to the provisions of the Assessment Act in force at the date of the assessment, being those of R.S.O. 1897, ch. 224. The absolute statutory rule is that all property is taxable unless in some way exempted, and an exemption clause to fit any particular case must be found, as the saying is, within the four corners of the Act.

By sec. 2, sub-sec. 10, it is declared that the expressions "personal estate" and "personal property" shall include income. Not all income is taxable, and sec. 7, sub-sec. 26, shews to what extent it is exempt and what is taxable income. Applying that sub-section, the income in question is taxable income, unless its being in the hands of trustees, who have no personal interest in it, or because the beneficiaries are a university, makes it not so. Sec. 46 of the Act, as it stood at the date of the assessment, seems to meet the case: "Personal property in the sole possession, or under the sole control of any person or trustee, etc., shall be assessed against such person alone:" sub-sec. 1.

"Where a person is assessed as trustee, etc., he shall be assessed as such, with the addition to his name of his representative character, . . . and he shall be assessed for the value of the real and personal estate held by him, whether in his individual name, or in conjunction with others in such representative character, at the full value thereof, etc.:" sub-sec. 2.

I note that this section has now been amended by 63 Vict., ch. 34 (O.), but whatever may be the effect of the amendment, it has no bearing upon the question now before the Court.

Being personal property in the sole possession of trustees, the income in question is taxable under sec. 46. Its destination, whether to university purposes or private beneficiaries, seems to me to be immaterial. It is suggested, as I understand, that it may be exempt under sec. 7, sub-sec. 24, as being "so much of the personal property of any person as is equal to the just debts owed by him on account of such property," the right of

the beneficiaries to receive it being regarded as the just debt owed by the trustees. But in that sub-section the Legislature is using ordinary language to describe the ordinary case of the owner of property owing debts on account of it, and its value to him is what remains after deducting these debts.

The language is quite inapt to describe the relation of *cestui que trust* and trustee, and the latter's duty to pay over the income of the property in his hands. Were the appellants' contention well founded, it appears to me that the scope of the operation of sec. 46 would be extremely limited. The income is the income of the trustees, the balance of gain over loss, derived from their management of the estate. And, *quod* trustees, they expend it no doubt in execution of their trust, but it is their expenditure, just as the expenditure of a private individual is his own.

It is taxable in their hands regardless of how the beneficiaries expend it. If the Legislature had intended that it should be exempt under the Act of 1897, as being devoted to university purposes and as really being the property of the university, or taxable only on the footing of the university being the owners, they would doubtless have enacted in regard to it, as they have done in regard to university buildings and grounds by sec. 7, sub-sec. 4, that such income should be exempt whether vested in a trustee or otherwise, so long as it was actually used or expended for the purposes of the university.

The case of *In re Canada Life Assurance Company Assessment* (1898), 25 A.R. 312, may be referred to.

I think the appeal should be dismissed.

Assessment affirmed.

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Mortgage—Covenant—Release—Sale of Equity of Redemption.

When land subject to mortgage is sold by the mortgagor and the purchaser assumes and covenants to pay the mortgage the mortgagor does not become to the mortgagee a surety in the technical sense, and the doctrines as to the discharge of sureties do not apply to him to their full extent. The mortgagor is liable therefore upon his covenant notwithstanding a previous extension of time granted by the mortgagee to the purchaser, if when the liability is enforced the right of the mortgagor to redeem is not affected. Judgment of a Divisional Court, 32 O.R. 175, affirmed, OSLER and MACLENNAN, J.J.A., dissenting.

AN appeal by the defendant Ivey from the judgment of a Divisional Court, reported 32 O.R. 175, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 18th of March, 1901.

H. D. Gamble, for the appellant.

D. W. Saunders, and *E. C. Cattanaach*, for the respondent.

September 21. ARMOUR, C.J.O. :—The defendant Ivey, being the owner in fee of the east half of lot number fourteen in the eighth concession of the township of Walpole, conveyed the same by way of mortgage on the 7th of January, 1887, to the accountant of the Supreme Court for securing the sum of three thousand dollars and interest, and covenanted with him that he would pay the mortgage money and interest at the times specified in the said mortgage.

The defendant Ivey thereafter, on the 14th of February, 1889, conveyed the said mortgaged land to one Alexander Gracey, in fee, subject to the said mortgage.

By this last mentioned conveyance the defendant Ivey ceased to have any interest in the equity of redemption of the said land and thereby lost his right to redeem the said land.

His only equity then was to compel his vendee, Alexander Gracey, who took subject to the mortgage, to pay it off as fast as the mortgage money and interest fell due.

On the 1st of May, 1890, the mortgagee assigned the said mortgage, and the land thereby mortgaged, and the mortgage

money thereby secured, and all the covenants therein contained to the plaintiff.

And on the 22nd of December, 1894, the said Alexander Gracey conveyed the said mortgaged land to one Alfred Gracey, in fee, subject to the payment of the said mortgage.

The mortgage money fell due on the 10th of January, 1895, and I find that the plaintiff for good consideration extended the time for the payment of the said mortgage money by Alfred Gracey until the 10th of January, 1896.

On the 18th of July, 1898, the defendant Ivey assigned his right to compel Alexander Gracey to pay the mortgage money and interest to the plaintiff.

And on the 13th of September, 1898, this action was brought against the defendant Ivey on his covenant contained in the said mortgage.

The extension granted by the plaintiff to Alfred Gracey of the time for the payment of the mortgage money above mentioned is insisted upon as discharging the defendant Ivey from the obligation of his covenant, but I do not think that he could complain of this, for, at the time during which this extension was granted, he had no right to redeem, and it was only the bringing of this action which gave him a right to redeem—a new right, having lost his former right by conveying his equity of redemption to Alexander Gracey.

This action being brought against the defendant Ivey on his covenant, his only equity then was, on payment of the money recoverable from him upon his covenant, to have a conveyance of the mortgaged land unaffected by any act of the plaintiff and subject to such equity of redemption as might be subsisting in any other person, and the evidence shews that the plaintiff at the time this action was brought was in a position to make such reconveyance.

The judgment will be varied by providing that upon payment of the judgment herein, and contemporaneously with such payment, the plaintiff shall reconvey the mortgaged land to the defendant Ivey unaffected by any act of the plaintiff and subject to such equity of redemption as may be subsisting in any other person. I refer to 2 Equity Cas. Abr. 605; *Lomax v. Bird*

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(1683), 1 Vern. 182; *James v. Biou* (1818), 3 Swanst. 234; *Kinnaird v. Trollope* (1888), 39 Ch D. 636

In my opinion the appeal should be dismissed with costs.

MOSS, J.A.:—Falconbridge, J., at the trial, based his judgment in favour of the plaintiff upon three grounds: (1) that no binding agreement for an extension of time to Alfred Gracey was established; (2) that in any event the defendant Ivey did not occupy such a position of surety as to entitle him to avail himself of the defence of extension of time to Alfred Gracey; and (3) that there was in the plaintiff's dealings with Alfred Gracey a reservation of rights against the defendant Ivey. In the Divisional Court the first point was not expressly dealt with, but the judgment was affirmed on the second of the above grounds, assuming that a binding agreement for extension was proved. This made it unnecessary to consider the third ground.

Upon the argument before this Court the question chiefly discussed was whether the view upon which the Divisional Court proceeded was right.

The circumstances of the case are somewhat peculiar, and I have no desire to decide anything beyond what the facts require. I am strongly inclined to the view that the learned trial Judge rightly held that no binding agreement for extension was made with Alfred Gracey. [The learned Judge referred to the evidence and continued:]

But giving these dealings their fullest effect in favour of the defendant Ivey, what advantage can he take of them as an answer to the plaintiff's demand on his covenant?

Alfred Gracey made no further payment on account of either principal or interest. When this action was commenced the alleged extension had long expired, and there was nothing in fact to prevent the plaintiff from reconveying the mortgaged premises to the defendant Ivey or assigning the mortgage to his nominee upon payment of the amount due under it for principal and interest. But the defendant Ivey contends that he stands released from all liability under his covenant. If this be so, it must be because the plaintiff has elected to look to the security of the mortgaged premises alone, for he has gained no other debtor to whom he can look in substitution for the defendant

Ivey. He must be deemed to have accepted the security given for the debt in lieu of the debtor's promise to pay and the security for the debt. In order to see whether this result has been reached it is necessary to consider the position of mortgagee and mortgagor, first while the latter continues to hold the mortgaged premises, and, secondly, after he has parted with them to a purchaser who becomes either by agreement with him or by force of law liable to indemnify him against payment of the mortgage debt.

A mortgagee holding a covenant by his mortgagor to pay the debt is under no obligation to resort to any one of his remedies in preference to another. He may sue on the covenant and obtain judgment for the payment of the debt. Or he may institute an action for foreclosure of the equity of redemption without claiming payment under the covenant. In the one case he is looking to the person of his debtor; in the other he is looking to the mortgaged estate. Or he may institute a proceeding to recover on the covenant and at the same time foreclose or sell the mortgaged premises. Against any of these methods of proceeding a mortgagor in default can maintain no objection, except, perhaps, as to the matter of costs under some circumstances. But he can only restrain or prevent the proceedings by payment of the debt. In case of payment he is entitled to a reconveyance of his estate, "and the mortgagee is charged with the duty of making such reconveyance upon such payment being made. This, indeed, is no more than the necessary result of the relative positions of the parties, the mortgage being only a security for the debt": *Walker v. Jones* (1866), L.R. 1 P.C. 50, at p. 62. He may under the statute have an assignment of the mortgage to a third party if he prefers it. Now in what respect, if at all, is a mortgagee's position altered when his mortgagor conveys the equity of redemption to a purchaser? No privity is thereby created, and the mortgagee does not gain the personal responsibility of the purchaser.

On the other hand no change is made in his relation towards the mortgaged premises. He is not obliged to treat them as the primary security and the mortgagor's covenant as the secondary security.

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He may still exercise his choice as to whether he will proceed against each separately or against both together. As to him, the mortgagor is in the position of a debtor who is still liable to pay when called upon without being entitled to compel the mortgagee to resort in the first instance to the security of the land. He cannot call upon the mortgagee to enter into possession of the mortgaged premises or deal with them by sale or otherwise in order that he may be relieved upon his covenant.

No doubt if the mortgagee enters into possession of or deals with the mortgaged premises he must account for his dealings, and the mortgagor if called upon to pay is entitled to the benefit of the account, but the same thing would occur if the possession were taken or the dealing had while the mortgagor continued the owner of the equity of redemption. The mortgagee's position is not altered in any respect by the mortgagor parting with the equity of redemption. He has still the same debtor and the same security, and he owes to the mortgagor the same duties that he previously owed, and no others. But the mortgagor by parting with the equity of redemption changes his relation to the mortgagee to the extent that he is no longer entitled to redeem as of course. The equity and right of redemption he has vested in another. And unless and until the mortgagee calls upon him to pay under his covenant he has not the right to require the mortgagee to receive the money from him and to reconvey the estate or assign the mortgage to a third party for him. In *Kinnaird v. Trollope*, 39 Ch. D. 636, it was conceded in argument, as stated by Stirling, J., at p. 642, that, where the mortgagor has assigned absolutely his equity of redemption in the mortgaged property, so long as the mortgagee abstains from suing, the mortgagor cannot bring an action to redeem; and further, that if the mortgagee chooses to assert his right to foreclose the mortgagor is not a necessary party to the foreclosure action. If he is not a necessary party to a foreclosure action it must be because he is not entitled to redeem. Otherwise the action would be imperfectly constituted as regards parties, and the foreclosure proceedings would not confer an absolute irredeemable title. But if instead of foreclosing merely the mortgagee resorts to the covenant for payment, then a right to redeem arises. I entirely agree with the

statement of law made by Stirling, J., in *Kinnaird v. Trollope*, at p. 645, as follows: "I think, therefore, that a mortgagor who has entirely parted with the equity of redemption nevertheless acquires upon being sued by the mortgagee a new right to redeem, in the same way as a mortgagor who has been absolutely foreclosed acquires, upon being sued, a new right of redemption." It follows that upon redeeming, the mortgagor would be entitled to a reconveyance of the estate as remarked by Stirling, J., and as laid down in *Palmer v. Hendrie* (1859), 27 Beav. 349. Sir John Romilly, M.R., said (p. 351): "The mortgagee has a right to make use of all his remedies against the mortgagor for obtaining payment of his money; but as soon as the mortgage money has been fully paid he is bound to deliver over the mortgaged estate to the mortgagor."

What then is required of the mortgagee when he sues his mortgagor on the covenant? It is that he shall be in a position to deliver over the mortgaged estate to the mortgagor upon payment by him.

In the present case that was the position when the action was commenced, and is still the position. The plaintiff has never been in possession, and is not liable for rents and profits or for depreciation. The property has been used and dealt with by Alexander Gracey, to whom the defendant Ivey sold, and by Alfred Gracey, who purchased from Alexander.

The plaintiff can make a reconveyance of the estate, or discharge the mortgage, or assign it to a third party for Ivey's benefit. But the latter says that because of the alleged agreement for extension until January, 1896, there was a time during which the plaintiff could not have reconveyed or assigned to him the estate or mortgage untrammelled by the agreement with Alfred Gracey, and that being so the plaintiff cannot now sue on the covenant although he is in a position to restore the estate.

Such a conclusion can only be arrived at by a rigid application of the most rigid rules applicable to the relation of principal and surety. And with great deference I am of opinion that they are not applicable to a case like the present.

If the enquiry be made, how did the parties reach the position in which the mortgagee, the creditor, finds himself obliged

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to regard the mortgagor, whose covenant he holds, as merely a surety instead of his principal and only debtor, considerable difficulty must be found in answering it. I have already pointed out that at the outset the mortgagor is primarily liable and, in every sense of the word, the principal debtor, the land being the pledge for his debt. What is the process by which, on the transfer of the equity of redemption to a purchaser to which the mortgagee is no party, the land becomes primarily liable and the mortgagor is put in a position to claim as against the mortgagee the rights of a surety? He is not surety for the purchaser, because the latter is not in any way liable to the mortgagee. There is no principal debtor liable to the creditor, and as the obligation of sureties is accessory to that of a principal debtor it follows that it is of the essence of this obligation that there should be a valid obligation of a principal debtor : DeColyar, 3rd ed., p. 210.

It is, of course, not necessary to the relation of principal and surety that as between them and the creditor the one should be primarily and the other secondarily liable. Both may be equally liable to the creditor, who may nevertheless be bound to accede to one all the rights of a surety. But there must be an obligation or liability on the part of both to the creditor in order to the creation of the relationship. One cannot be surety for the debt of another unless that other is himself liable as debtor. In all of the three kinds of cases specified by Lord Selborne in *Duncan Fox & Co. v. North and South Wales Bank* (1880), 6 App. Cas. 1, where the relationship of principal and surety subsists, there is found the element of liability of both principal and surety to the creditor. As stated by Lord Selborne they are (p. 11): "(1) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be com-

pelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid."

None of these fits the present case, and I am not aware of any English decision in which it has been laid down or suggested that the principles applicable to the relationship of principal and surety can be applied to a creditor who has not the obligation or liability of both to look to. Expressions are to be found in some Ontario cases which appear to favour the notion, but the express decisions are in the opposite direction.

In *Aldous v. Hicks* (1891), 21 O.R. 95, the learned Chancellor had to deal with a case where, upon facts resembling those in this case, it was contended that the mortgagor was released from liability upon his covenant. The Chancellor pointed out that though there was a purchaser of the equity of redemption who covenanted to pay the mortgage, and so became primarily liable for the mortgage debt as between her and the mortgagor, no privity of contract was created between her and the mortgagee, and that there was, therefore, at the outset an absence of the threefold relation of creditor, principal, and debtor and subsidiary debtor or surety upon which the equitable doctrine involved could operate.

In *Barber v. McCuaig* (1897), 24 A.R. 492, the learned Chancellor and Ferguson and Meredith, JJ., sitting as a second division of this Court, dealt with a defence founded upon the proposition that the mortgagor upon transferring his equity of redemption to a purchaser who agreed with him to pay the mortgage debt and indemnify him against all claim for it, became a surety and the purchaser became the principal debtor. The Court negatived that contention. The decision was reversed by the Supreme Court (1898), 29 S.C.R. 126, but, as pointed out by Meredith, C.J., in *Barber v. McCuaig* (2) (1900), 31 O.R. 593, that Court did not dissent from the view of the second division but adopted it. It is clear from a perusal of the judgment of Mr. Justice Gwynne that the Supreme Court was not of the opinion that the dealings of the mortgagee with the purchaser of the equity of redemption, which involved extending the time for payment of the mortgage money, operated as a discharge of the mortgagor upon his covenant for payment. There was at most a suspension of the remedy.

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And as appears from the later report the mortgagee finally succeeded against the mortgagor. In *Watson v. Bell* (1895), now reported as an addendum to the report of the opinion of Meredith, J., in this case (32 O.R. 181) the question appears to have been whether the giving of time for payment of a mortgage to a purchaser of the equity of redemption discharged the mortgagor from liability upon his covenant.

There is a full discussion of the question whether the mortgagor thus became a surety and entitled to all the rights accorded by the law to one in that position. The decision was adverse to the mortgagor's contention.

In my judgment these decisions correctly state the law which should govern in this case. *Mathers v. Helliwell* (1863), 10 Gr. 172, has been much discussed. If it is to be taken as going the length of deciding that a mortgagor who has conveyed his equity of redemption, taking a covenant to pay off the mortgage, becomes a surety or subsidiary debtor to the mortgagee and entitled to all the rights of a surety against him, I think, with submission, that it goes too far, and is not in accord with the trend of modern decisions.

But if by contract or arrangement the defendant Ivey assumed the position of surety towards any person it was towards Alexander Gracey. It is against him that he could enforce the right of reimbursement or indemnity in the event of being obliged to pay, and that is not impaired by the plaintiff's dealings with Alfred Gracey. This person never even stood towards the defendant Ivey in the relation of one who either expressly or by implication engaged to pay off his debt or indemnify him against his liability upon his covenant. The doctrine of discharge of a surety by giving time to the principal could not be made applicable, for Alfred Gracey could never be considered the principal debtor. The situation cannot be more aptly described than in the language of my brother MacLennan in *Trust and Loan Co. v. McKenzie* (1896), 23 A.R. 167, at p. 170: "The present case is therefore not a case of suretyship at all within the decisions as to discharge of surety by dealings without his consent between the creditor and principal debtor. It is really only a case of indemnity. McKenzie, the mortgagor, sold the property to Franklin, subject to the mortgage, and took

a covenant from him to pay it. Franklin did not, by that purchase, become a debtor to the plaintiffs, and so did not become a surety for McKenzie; he simply became bound to indemnify McKenzie, and to relieve him from paying the mortgage by paying it himself. That covenant of Franklin's still remains in full force, and has never been interfered with in any way by the plaintiffs. Then Franklin sold to Isabella McLaughlin, subject to the mortgage. It is not said that she covenanted to pay it, so that her liability to do so was an implied and not an express liability; and Mrs. McLaughlin, no more than Franklin, did not become a debtor to the plaintiffs."

It has been suggested that the mortgaged premises should be treated as the primary security and, in that sense, the principal debtor. It was, of course, competent for the parties to so agree at the outset, or perhaps afterwards upon good consideration. But I am not aware of any principle which enables the mortgagor and a purchaser from him of the equity of redemption by arrangement between them to so alter the rights of the mortgagee as to compel him to regard the land as the primary security.

The mortgagor having of his own will parted with his equity of redemption must, when by action brought against him on his covenant he is restored to his right to redeem, be content if the mortgagee is in a position to restore him the mortgaged premises.

Some reliance is placed on *Gowland v. Garbutt* (1867), 13 Gr. 578. The suit was for the administration of the estate of one William Knaggs deceased, and the claim in question was made by one James Thompson upon a mortgage held by him upon the lands of one George Knaggs. After the execution of the mortgage George Knaggs had sold and conveyed twenty acres of the mortgaged premises to one William James with whom he covenanted for freedom from encumbrances and to indemnify the twenty acres against Thompson's mortgage. In order further to secure James against the Thompson mortgage the deceased, William Knaggs, executed a bond in his favour conditioned for holding him harmless in respect of it.

There were various dealings by Thompson with the remainder of the mortgaged premises, the result of which was,

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as it was found, that Thompson had released the twenty acres from his mortgage, and that, therefore, the estate of William Knaggs was relieved from liability under his bond to William James. It is apparent that the case was not one in which the mortgagor was claiming to be relieved from his covenant to Thompson, but the question was whether the mortgagor's surety had been discharged from liability to William James through Thompson's dealings with the mortgaged premises.

In noticing some of the arguments advanced in support of Thompson's claim against the twenty acres, Mowat, V.C., said (p. 583): "The learned counsel for the appellant stated, I think, that he was authorized by Nicol to say that on payment of the mortgage money by James he would convey to him unconditionally the property. But assuming this to be so, mortgaged property cannot be redeemable or irredeemable from time to time, and the mortgage debt, discharged and revived, at the mere pleasure of the mortgagee and those claiming under him." This must be read with reference to the circumstances and in the light of the next sentence on the same page. The Vice-Chancellor continues: "The right to foreclose" [that is, as I understand it, the right to foreclose the twenty acres in respect of which William Knaggs was surety, but which had been held to be released from Thompson's mortgage] "once gone is, I apprehend, gone forever; and when it is considered that William Knaggs was a mere surety and that William James was in effect a surety (his land having been subject to the mortgage debt at the time of his purchase, but the seller [*i.e.*, the mortgagor, George Knaggs] having agreed to pay off the mortgage), it is too plain for argument that the liability of both William Knaggs and William James, if suspended by the sale to Nicol, cannot possibly be revived afterwards without their consent, even if the position of a mortgagor who was the principal debtor and not a surety would be different." And it is to be observed that the earlier dictum was questioned by Spragge, C., in *Munsen v. Hauss* (1875), 22 Gr. 279 at p. 285.

In my opinion the appellant fails and the judgment should be affirmed.

LISTER, J.A.:—I agree with the judgment just read.

OSLER, J.A.:—I think, for the reasons given by my brother Maclellan, whose judgment I have had an opportunity of reading, that the appeal should be allowed.

MACLENNAN, J.A.:—The facts are simple. Mortgage by defendant Ivey to plaintiff, 7th January, 1887, due 7th January, 1895. Conveyance by Ivey to Alexander Gracey, 14th February, 1889. Mortgage debt to be paid by Gracey. Sale and conveyance by Alexander Gracey to his son Alfred Gracey, 22nd December, 1894, in consideration of the mortgage debt. An agreement between plaintiff and Alfred Gracey without the knowledge or consent of Ivey, 23rd May, 1895, to extend the mortgage till the following January, on payment of arrears of interest and insurance premium. Arrears of interest and insurance premium paid accordingly on 3rd June, 1895, by Alfred Gracey. Assignment, 18th July, 1898, Ivey to plaintiff of his right of action against Alexander Gracey for indemnity against the mortgage debt. Action commenced 13th September following against Ivey and Alexander Gracey. Alfred Gracey not made a party. Alexander Gracey made no defence, and Ivey's defence, the extension of time granted to Alfred Gracey, without his knowledge or consent. It ought also to be stated that the extension of time was granted by the plaintiff with full knowledge that the assignments of the equity of redemption were both made subject to payment by the respective assignees of the mortgage debt.

No case precisely like the present has been cited to us, nor have I been able to find any; and the appeal must therefore be decided on principle. And I am of opinion that on well settled principles our judgment must be for the appellant.

There are two principles from which that result must follow.

The first is that by which where a mortgagee has put it out of his power to restore the mortgage property to the mortgagor on payment of the debt he will be restrained by a court of equity from suing upon the covenant.

The other is the principle upon which a creditor is prevented from suing a surety after he has given time to the defendant debtor without reserving his remedy against the surety. *Perry v. Barker* (1806), 13 Ves. 198, was a case in which after

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foreclosure and sale for less than his debt the mortgagee sued on the covenant for a deficiency. The action was restrained by a perpetual injunction. But Erskine, Lord Chancellor, said he thought if there was any probability that the mortgagee could get the estate back again he ought to have a time limited for that purpose.

The opinion of Lord Chancellor Erskine has not been followed. In *Lockhart v. Hardy* (1846), 9 Beav. 349, Lord Langdale referred to that case and a similar case of *Tooke v. Hartley* (1786), 2 Br. C.C. 125, before Lord Thurlow, as having left the matter in great obscurity, and said he thought it would be altering the nature of the contract between the parties, and giving the mortgagee the benefit of a trust for sale with a bond or covenant for the deficiency, instead of a mortgage bond or covenant. He thought such was not the law, and proceeded upon this that in equity the mortgagee is bound to restore the estate on full payment of the debt, and that having sold the estate and thereby disabled himself from restoring it, he is not in a condition to demand payment of the whole debt which he does when he sues on the bond.

In *Palmer v. Hendrie*, 27 Beav. 349, Romilly, M.R., said (p. 351): "If it appear, from the state of the transaction, that, by the act of the mortgagee, unauthorized by the mortgagor, it has become impossible to restore the estate on payment of all that is due, the Court will interfere and prevent the mortgagee suing the mortgagor at law." That was said on a motion for an interim injunction. The judgment at the hearing of the same case is reported in (1860), 28 Beav. 341, when the injunction was made perpetual.

In *Walker v. Jones*, L.R. 1 P.C. 50, Turner, L.J., delivering the judgment of the Court, says (p. 61): "It is also clear that every mortgagor has the right to have a reconveyance of the mortgaged property upon payment of the money due upon the mortgage; and that every mortgagee is charged with the duty of making such reconveyance upon such payment being made. This, indeed, is no more than the necessary result of the relative position of the parties, the mortgage being only a security for the debt." In the same case Sir Hugh Cairns, counsel for the mortgagor, stated the principle to be "that a mortgagee should

be in a condition to return the mortgaged property *in statu quo ante* when paid the debt, and that if he cannot do that he will not be allowed to proceed for the debt on any other security he may have."

In *Trust and Loan Co. v. McKenzie*, 23 A.R. 167, we had the same point before us, and the majority of the Court were of opinion that but for the reservation of rights made by the mortgagees an extension of time for two years, without the consent of the mortgagor, given to the assignee of the equity of redemption for payment of the mortgage debt would have discharged the mortgagor. I quote from the judgment, pp. 173-4: "But being the owner of the land, such an agreement (*i.e.*, for extension of time), without some stipulation to the contrary, would give Treblecock a right against the plaintiffs and all the world to be free from foreclosure proceedings until the expiration of the extended time for payment. Therefore, if McKenzie, being sued on his covenant, and being compelled to pay, and having obtained a reconveyance or assignment of the mortgage, according to his undoubted rights, sought to obtain repayment by suit against the mortgaged lands, he would be met by the agreement for an extension of time made between the plaintiffs and Treblecock. By agreement between the mortgagees and the owner, the land has been tied up for two years, and the mortgagor's right to resort to the land for payment has been destroyed. His right was a right to immediate indemnity, and that right is now gone by the act of the mortgagee. The mortgagee has, therefore, by his agreement with the present owner made his mortgage unredeemable by the mortgagor according to its terms, and the effect of that must be to discharge the mortgagor from liability altogether. The mortgagor's liability on his covenant and his right to have the mortgage estate restored to him upon payment are reciprocal, and if the mortgagee cannot restore the estate in its integrity, save so far as any impairment was warranted by the terms of the mortgage itself, such as a sale of part of the land under a power, etc., then he cannot enforce the defendant's covenant, his liability is gone." The learned Chancellor appears to have misunderstood this judgment, which was the judgment of the majority of the Court, and plainly proceeded on this,

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that the mortgagor would have been discharged by the extension of time given to the assignee of the equity of redemption, but for the reservation of rights by the mortgagees. That was the *ratio decidendi*. My learned brother Osler gave no judgment in the case, but was of opinion that it was a case of suretyship, and that the defendant was discharged by the giving of time, the reservation in his opinion not being sufficient. The only difference between that case and the present is that there the extension was for two years, whereas here it was only for seven months; and that in that case there was a reservation of rights, while in this case there was none.

It seems obvious that the mere duration of the extension of time can make no difference in such a case, any more than in a case of suretyship. The important circumstance in both kinds of cases is that rights of the debtor, indeed *all* his rights, are absolutely destroyed for a longer or shorter time, without his consent. His right was to pay, with a correlative right to resort to the land for indemnity. His right was to compel Alexander Gracey to pay, and both these rights no longer exist. If the mortgagee could extend the time for seven months or two years, he could equally do so for ten or twenty or a hundred years. It may be said that the debtor could make a tender of the money, and demand a reconveyance, and that if refused he would be free from the debt after that. But such a tender would be useless while the extension of time continued, for he would not be obliged to take a reconveyance with his remedy by foreclosure suspended. A tender under such circumstances would be a vain form. It is clear that if after foreclosure the mortgagee sell the land, the mortgagor is free forever, even if the mortgagee should buy it back again, and the same principle must be applicable to an extension of time, otherwise the debtor's rights would be intermittent at the will of the mortgagee.

This is not new doctrine in our Courts. In *Mathers v. Helliwell*, 10 Gr. 172, Vankoughnet, C., applied it in a case where the mortgagee in consideration of the assignee of the equity of redemption agreeing to pay the mortgage debt extended the time for payment for five years. He says (p. 175): "Helliwell (the assignee) undertook with her (the mortgagor)

to pay off the mortgage money which she had contracted to pay. Her equity was to compel him to do this and relieve her. Behind her back the mortgagee agrees with him that this money shall not be exacted for five years, on certain terms. Her equity is to compel Helliwell to pay off the mortgage. The mortgagee, without her assent, binds himself that Helliwell shall not be compelled to do this, and that he will not receive it for five years beyond the time the money is payable, and agrees with him that it shall be expressly charged on the land. I think that in the face of this agreement he can no longer insist on any personal liability of Mrs. Townsley." The Chancellor thinks that case merely decides that pending the arrangement for the five years extension which was current when the action was brought it was not competent to make an immediate collection of the mortgage money from the mortgagor. I do not think the case admits of that view being taken of it. The five years extension was merely of the principal money. There was no extension of time for payment of interest. The prayer of the bill was for payment of the whole debt, as well as interest, and such is the decree, which I have examined; so that the extension must have been regarded as lost by non-payment of the interest, and was not current when the action was brought.

In *Gowland v. Garbutt*, 13 Gr. 578, where a mortgagee had put it out of his power to reconvey a part of the mortgage property, but had afterwards obtained an agreement to have it back, Mowat, V.C., held that the mortgagor's liability was not thereby restored. He said (p. 583): "Mortgaged property cannot be redeemable and irredeemable, from time to time, and the mortgage debt discharged and revived at the mere pleasure of the mortgagee and those claiming under him. The right to foreclosure once gone is, I apprehend, gone for ever."

But I am also of opinion that the appellant was to the knowledge of the respondent a surety for the mortgage debt, when the extension of time was given to Alfred Gracey, and he is discharged on that ground.

It is now settled that a creditor is bound to regard a suretyship which comes to his knowledge, although it may have arisen after the debt has been contracted: *Rouse v.*

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Bradford Banking Co., [1894] A.C. 586; and the only question is whether this is a case of suretyship, although Alfred Gracey the owner of the land was not personally liable to the mortgagee for the payment of the debt.

I think it is, and I adopt the conclusion and the reasoning on the point of my brother Osler in *Blackley v. Kenney* (1890), 29 C.L.J. at pp. 110, 111. Suretyship may be either by personal obligation, as by bond, covenant, etc., or it may be by mortgage or pledge of property, without direct personal liability. What possible difference can it make whether it be one or other? In either case the surety stands to lose either money or property, to a certain amount, if the principal do not pay. And his great concern is to take care that the principal do pay. Now, if a creditor have one man's covenant and another man's property, for the same debt, either one or other may, as between themselves, be the one who ought to pay, and I think it plain it is quite as much a case of suretyship in the one case as in the other. Therefore, although Alfred Gracey was not personally liable to the respondent for the debt, and the appellant was, yet inasmuch as the respondent had Gracey's land and Gracey was the one who ought to pay, the latter was a principal and the appellant a mere surety.

The reasoning of Lord Loughborough in the leading case of *Rees v. Berrington* (1795), 2 W. & T.L.C., 7th ed., at p. 571, is just as applicable to a case of this kind as to the ordinary case of suretyship by contract. He says: "Suppose a bond payable in six months, with a surety, he does not become bound to answer the payment at twelve months, where it was to be at six. . . . The obligee thinks fit totally to change the nature of the security and the credit; . . . and, doing this, he does this material injury to the surety; he has a right the day after the bond is due, to come here and insist on its being put in suit; the obligee has suspended that till the time contained in the notes runs out; therefore, he has disabled himself to do that equity to the surety which he has a right to demand. . . . The defendants have put it out of their power to perform that which the nature of the relation between the surety and the person with whom he is bound requires. It is a breach of the obligation in conscience and honesty."

In *Craythorne v. Swinburne* (1807), 14 Ves. 160, Sir Samuel Romilly, *arguendo*, p. 162, said: "The whole doctrine of principal and surety, with its consequences of contribution, etc., rests upon the established principles of a court of equity; not upon contract; except as it may be so represented upon the implied knowledge of those principles." And this statement was approved of by Lord Eldon, p. 169, he saying that the jurisdiction assumed by courts of law rests on the universal acknowledgment of the principle of equity.

In *Samuell v. Howarth* (1817), 3 Mer. 272, Lord Eldon says again: "The liabilities of sureties are governed by principles which have long been settled in equity and are now adopted in courts of law. I say *now*, because the Court of Common Pleas formerly held a different doctrine. . . . The surety is held to be discharged for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal, or not; and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract."

In *Polak v. Everett* (1876), 1 Q.B.D. 669, Lord Blackburn says (p. 673): "It has been established for a very long time, beginning with *Rees v. Berrington*, 2 Ves. 540, to the present day, without a single case going to the contrary, that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing he deprives the surety of part of the right he would have had from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor, and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even possibly benefiting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether."

In *In re Sherry* (1884), 25 Ch.D. 692, Lord Selborne says (p. 703): "It is an equity which enters into our system of law, that a man who makes himself liable for another person's debt is not to be prejudiced by any dealings, without his consent, between the secured creditor and the principal debtor."

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Now the rights of the parties in this case as between themselves are partly legal and partly equitable. They are unquestionably in the nature of suretyship rights, and I think we are compelled to apply to them the equitable principles applicable to such rights. I will suppose the case of a man buying an annuity, of say \$1,000 a year, for five years, charged upon land. It is a mere charge, without any one being personally liable for it, as often happens. The purchaser refuses to buy without the bond or covenant of a surety, for its due payment, and he gets it. He then by agreement with the land owner, and without the knowledge or consent of the surety, extends the time of payment of the annuity. Would it not be an extraordinary thing to say that it was not a case of suretyship, and that the surety was not discharged? If it would how does that case differ from the present?

Again, I will suppose that under the old law, a married woman mortgaged her land for a loan, with a surety. She could not make herself personally liable by covenant, but would not time given to her discharge the surety?

In *Robinson v. Gee* (1749), 1 Ves. Sr. 251, Lord Hardwicke says: "It is a common case for a wife to join in a mortgage of her inheritance for a debt of her husband; after the husband's death she is entitled to have her real estate exonerated out of the personal and real assets of the husband; the court considering her estate only as a surety for his debt."

In *Hodgson v. Hodgson* (1837), 2 Keen. 704, a married woman had charged her separate estate, as a surety, to one of two other sureties for a debt of her husband, who, as between themselves, had mutual rights of contribution. The plaintiff, to whom the lady was surety, released her co-surety from her right of contribution, and it was held by Lord Langdale, that to that extent the lady's estate was discharged.

In *Royal Canadian Bank v. Payne* (1872), 19 Gr. 180, Mrs. Payne, a married woman, appointed her separate estate by way of mortgage as security to the extent of \$800 for goods to be supplied to her son. Spragge, C., held the mortgage to have been discharged on two grounds, one of which was time given to the debtor.

It follows from these cases, I think, that to constitute a case of suretyship, to which the rule of discharge by giving time applies, it is not essential that the liability of either the principal or the surety should be a personal liability. Either or both may be a liability of property only. One married woman might be surety for the debt of another married woman, both liabilities being in respect of the separate estate alone, without any personal liability. And in my opinion no good reason can be suggested why in such a case the equitable principle ought not to be applied, and the surety be held to be discharged by time given to the principal debtor, just as it would if both were personally liable.

I do not think the case is affected by the judgment of the Supreme Court of *McCuaig v. Barber*, 29 S.C.R. 126, which dismissed the action, just as Falconbridge, J., had done at the trial.

I therefore think the appeal should be allowed and the action dismissed with costs here and below.

*Appeal dismissed, OSLER, and
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Mortgage—Redemption—Acceleration—Assignment Pendente Lite—Parties.

When a mortgagee, upon default in payment of an instalment of interest, brings a foreclosure action and claims payment of the full amount secured by the mortgage any party to the action by original writ or added in the Master's office or by subsequent order, is entitled to hold him to his election and to pay his claim. But this right must be taken advantage of in the foreclosure action and does not enure to the benefit of a person not a party to that action who ignores the foreclosure proceedings and brings a redemption action after making an independent tender to the mortgagee.

A person who, after the institution of the foreclosure action, acquires an interest in or claim against the mortgaged premises, may, on his application, be added as a party.

Judgment of Rose, J., reversed.

APPEAL by the defendant from the judgment at the trial. The following statement of the facts is taken from the judgment of MOSS, J.A. :—

This action is the last of five, if not more, actions all more or less directly affecting the title to a farm lot of one hundred acres in the township of Wallace, and all commenced within the space of two years, beginning in the year 1898.

The history of this manifold litigation is briefly as follows: Prior to the year 1898 one Robert William Henry Nelson (generally referred to in the proceedings as Robert Nelson), who was then the owner of the equity of redemption of the lot, became liable to an action at the suit of one William Gibson. This action terminated in judgment entered against Robert Nelson on the 6th of September, 1898, for \$1,500 and costs. The judgment was assigned to the plaintiff in the present action, who instituted an action against the present defendant and Robert Nelson to set aside as fraudulent a conveyance of the equity of redemption made by Robert Nelson to the present defendant during the pendency of the prior action. This second action resulted in judgment in favour of the plaintiff therein, declaring void as against the plaintiff and William Gibson the conveyance of the equity of redemption, but saving the rights of the present defendant as a mortgagee of the lot. The conveyance being thus out of the plaintiff's way, the

sheriff proceeded under writs of execution against lands issued in the first action to expose for sale the interest of Robert Nelson in the lot, and on the 24th of February, 1900, the same was purchased by Mr. Mabee, the plaintiff's solicitor, for \$500. On the 1st of March, 1900, the sheriff conveyed to Mr. Mabee, and on the 2nd March Mr. Mabee conveyed his interest to the plaintiff by two instruments of that date.

On the 20th of February, 1900, the third action was commenced by the present defendant seeking payment of the amount of his mortgage, and, in default, foreclosure. By the terms of the proviso for payment, the principal money was not payable until the 1st of March, 1907, but the claim was made that by reason of default in payment of an instalment of interest, the mortgagee was entitled to call in and be paid the whole of the mortgage money. The defendants in that action were Robert Nelson and one Ann Nelson, his grandmother, who held a prior mortgage on the same and other farm lots, securing her in respect of an annuity of \$90 and other annual provisions. At the date of the present plaintiff's purchase, one George Nelson was in possession of the lot in question, and, having refused to deliver possession to the plaintiff, the fourth action was commenced against him for the recovery of possession. On the 2nd of March, 1900, the plaintiff, through her solicitors, opened a correspondence with the solicitors for the present defendant with a view to paying the mortgage claim and obtaining an assignment or discharge thereof, and thereupon ensued a correspondence extending over two months, conducted with much diplomacy on both sides. The plaintiff's solicitors insisted that the defendant should accept payment of the principal, interest and costs without prejudice to the plaintiff's right to charge the defendant with rents and profits and otherwise reduce the claim, and either assign or discharge the mortgage. Ultimately a tender was made on the 24th of April, 1900, of \$2,878.77, and this not being accepted, the present action was begun on the 8th of May, 1900, seeking a declaration that the plaintiff was entitled to redeem the defendant in respect of his mortgage and that a good tender had been made. The plaintiff asked for an account with the usual proper directions, and for an injunction restraining the defendant from further prosecuting

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his foreclosure action. At the date of the commencement of this action, the foreclosure action was entered for trial at the Stratford sittings. It was actually heard on the 9th of May, and judgment was reserved. At the same time the learned trial Judge heard an *ex parte* motion on behalf of the plaintiff in the foreclosure action to add Mr. Mabee, the purchaser at the sheriff's sale, as a party in the Master's office, in such manner and with such directions as that he would be there in the same position as if made a party before judgment. The learned Judge considered that the plaintiff's object was to enable the plaintiff to get some relief against Mabee without making him a party before judgment, and he refused to make any order. Judgment was pronounced on the 15th of June, 1900, dismissing the action as against Ann Nelson, and giving the plaintiff therein the usual foreclosure decree with reference to the Master. The plaintiff therein carried the judgment into the Master's office, and produced certificates of the registrar and sheriff as to subsequent incumbrancers. Thereupon the Master ordered that the plaintiff in this action, William Gibson, and the Stratford Building and Savings Society be added as parties in his office as appearing to have some lien, charge, or incumbrance upon the mortgaged premises. In reality the Master had no power or authority to add any of these persons as parties in his office without a special order of the Court. William Gibson might have been so added as a person appearing to have an execution in the sheriff's hands against Robert Nelson's lands but for the fact that the sheriff's certificate shewed that under the execution he had sold and conveyed the interest of Robert Nelson to a purchaser. The interest of the present plaintiff appeared by the registrar's certificate to be that of owner of the equity of redemption, and as such the Master had no power without a special order of the Court to add her as a party defendant in his office. The Stratford Building and Savings Society's interest appeared to be that of holders of a mortgage made to it by the present plaintiff, but as she could not be added by the Master, and was not, therefore, properly before him, her mortgagee could not properly be added, nor could an incumbrance, which she appeared to have created, be effectively dealt with by the Master.

None of these parties did any act which would prevent them afterwards raising the objection at any stage of the action that they were not properly made parties in the Master's office. See *Cowan v. Allan* (1895), 23 A.R. 457, and (1896), 23 S.C.R. 292. However, proceedings went on in the Master's office, the plaintiff in this action being represented and seeking to reduce the amount of the mortgage claim, and also to shew a tender to the defendant in this action made before the judgment in the foreclosure action was brought into the Master's office. On the 1st of September, 1900, while proceedings were still going on before the Master, the statement of claim in this action was delivered. On the 7th of September the plaintiff in this action and William Gibson and the Stratford Building and Savings Society gave notice of motion in the foreclosure action to stay all proceedings on the reference or to set aside or discharge the Master's order making them parties defendants or to stay the reference until the trial of this action. This motion was returnable before the local Master at Stratford on the 12th of September, and was then enlarged. On the 17th of September the statement of defence in this action was delivered, and on the 27th of September the reply was delivered. On the 5th of October the local Master, at the request of the plaintiff in this action, referred the motion to stay proceedings, etc., to a Judge of the High Court for decision. It was then set down to be heard at the trial of this action. On the 28th of November, 1900, the Master made his report in the foreclosure action certifying that there was due to the plaintiff therein (the defendant in this action) for principal, interest and costs and subsequent interest the sum of \$3,071.21, which he appointed to be paid by Robert Nelson on the 28th of May, 1901. He also certified that William Gibson and the Stratford Building and Savings Society had not proved any lien, charge, or incumbrance, and he therefore declared them foreclosed of all interest in the lands. He further certified specially the contentions of the plaintiff in this action with regard to the possession of the lands and the tender to the defendant.

This action was tried and the referred motion was heard by the late Mr. Justice Rose on the 4th of December, when judgment was reserved and was subsequently delivered on the 17th

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of December. The formal judgment directed that all necessary enquiries be made, accounts taken, costs taxed, and proceedings had for the redemption of the premises, and that upon payment of the amount found due the defendant reconvey the mortgaged premises and deliver up all documents relating thereto; declared that a good and sufficient tender of all moneys due upon the mortgage was made; ordered that upon default in payment of the amount found due to the defendant the action be dismissed; and, finally, that the defendant pay the plaintiff's costs of the action.

The learned trial Judge also ordered a stay of proceedings in the foreclosure action, but the formal order has not been issued, owing, it is said, to some difficulty about settling the terms.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, and MOSS, J.J.A., on the 26th and 27th of March, 1901.

Idington, K.C., for the appellant.

Mabee, K.C., for the respondent.

September 21. MACLENNAN, J.A.:—I think it is very unfortunate that the plaintiff in the action to set aside the conveyance of the equity of redemption as fraudulent did not ask for a judgment directing a sale of the land by the Court instead of leaving it to be sold by the sheriff. The plaintiff was not a mere creditor, as in *Longeway v. Mitchell* (1870), 17 Gr. 190, but a creditor having judgment for his debt and execution in the hands of the sheriff. The legal title was in Ann Nelson, and the execution could only be made available against an equitable interest, the value of which depended on the state of the mortgage accounts. For forty years at least the course in such cases has been to have the sale made by the Court: see the form of such a judgment in *Pegg v. Eastman* (1867), 13 Gr. 137. If the plaintiff had asked for such a judgment, a long course of subsequent litigation, and the attendant expense, would have been avoided.

After the conveyance had been set aside, the present defendant, as mortgagee, on the 20th of February, 1900, commenced

an action of foreclosure against his son Robert, the mortgagor. The sheriff had not then, nor until four days afterwards (the 24th of February) sold the land. When the action was commenced the plaintiff had a mere lien or charge as an incumbrancer, and Robert was still the owner of the equity of redemption, and *non constat* that there ever would be a sale, or that Robert would not pay off the execution. The foreclosure action was therefore properly constituted, with Robert as a defendant. The sheriff's sale then took place, followed immediately by conveyance, and the present plaintiff became the owner of the equity of redemption. I am of opinion that that conveyance was effectual and valid, and that the grounds upon which *Heward v. Wolfenden* (1868), 14 Gr. 188, and the cases which followed it, were decided, are inapplicable, even if those cases can now have any applicability, having regard to R.S.O. 1897, ch. 77, sec. 33, first enacted in its present form by 40 Vict., ch. 8, sec. 37 (O.). But, although the plaintiff thus became the owner of the equity of redemption, she took it subject to the pending action of foreclosure, and, according to the well settled rule, the plaintiff was not bound to make her a party, but could go on with his action to a conclusion, she being bound by the result. At the same time, the assignee could at any stage have applied to the Court, under Consolidated Rule 206, to be made a party, but she would be bound by everything which had previously been regularly done. The present plaintiff did not apply to be made a party, but the Master having made her a party as an incumbrancer, she attended the proceedings. It is clear she had ceased to be an incumbrancer, and that the Master had no power to make her a party as such. But I apprehend she had, as an assignee *pendente lite*, a right to attend the proceedings and to be heard to the same extent and effect as the nominal defendant Robert, whose rights she had acquired. So also, if she had any fault to find with the Master's report, or even with the judgment at the hearing, there can be no doubt she had a right of appeal in the name of Robert; although, probably, the Court would of its own motion, or at the instance of the plaintiff, have ordered her to be made a party to the record. Immediately after the commencement of the foreclosure action, she became

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aware of it, and a correspondence took place between her solicitors and the solicitor for the mortgagee, with a view to the payment and redemption of the mortgage. Unfortunately the parties were not able to come to an agreement, and a tender was made about the 24th of April on the part of the present plaintiff to the solicitors of the mortgagee of a sum of money as a full payment of all that was due, but which was refused.

The foreclosure action then went on. No defence was made by the defendant Robert or by the now plaintiff. The trial was on the 9th of May, and on the 15th of June the usual judgment was pronounced with a reference to the Master.

On the reference the now plaintiff gave evidence of the tender, which was objected to on behalf of the mortgagee on various grounds. The Master gave no effect to it, not feeling at liberty to do so, having regard to the terms of the judgment. I think the Master was right. The tender might and should have been pleaded, and it was too late to attempt to set it up in the Master's office, having regard to the form of the judgment. It is noticeable that the present action was commenced on the 8th of May, and that at the trial of the foreclosure action on the following day the plaintiff moved *ex parte* to add the now plaintiff as a party thereto, but the motion was refused by the learned Judge. The appellant set up the foreclosure action and judgment therein as a defence to the present action; and I think that defence must prevail. When the present action was tried on the 4th, and when judgment was pronounced on the 17th, of December, there was in full force a judgment of foreclosure upon the same mortgage by which the now plaintiff was bound; the account had been taken, the amount due for principal, interest and costs had been ascertained, and the time had been fixed for payment. I think the learned Judge erred in directing judgment for the plaintiff, and that he should have dismissed the action with costs.

The learned Judge went further. He at the same time, on the motion of the now plaintiff, made an order in the foreclosure action staying all proceedings. I think that order was clearly wrong. It has never been drawn up. The appellants asked on the argument for leave to appeal from that order. If the respondent insists on upholding it, leave should be granted, but

we think it would be reasonable on her part to waive it; to consent to an order making her a party; and to agree upon a new computation of interest and a new day for redemption.

The appeal should be allowed with costs, and the action should be dismissed with costs.

Moss, J.A. :—The defendant puts forward many grounds of objection to the judgment, but they chiefly resolve themselves into objections to the validity of the tender and the mode of proceeding adopted by the plaintiff in instituting this action instead of availing himself of the proceedings in the foreclosure action. That the plaintiff was a person interested in the equity of redemption and entitled to redeem the defendant's mortgage under some conditions, was not disputed on the argument in this Court.

It is manifest from the frame of the formal judgment, as well as from the expressions of the learned trial Judge during the trial and in his written opinion, that notwithstanding his finding as to the tender, the defendant was not to be deprived of subsequent interest upon his mortgage. This was conceded by plaintiff's counsel. The chief importance, therefore, of the tender is in respect of its bearing in connection with other matters upon the question of the costs of this action.

There is little room for doubt that on the 24th of April, 1900, the plaintiff was a person having an interest in the lands comprised in the defendant's mortgage. Whether as owner of the equity of redemption according to her contention, or as assignee of a judgment on which there were executions against Robert Nelson's lands according to the defendant's contention, she was interested in the equity of redemption. If her contention was correct, and there was a valid sale of the equity of redemption under the execution, she was in a position to procure herself to be added as a party defendant under Con. Rule 206. On the other hand, if the sale was not valid, and the equity still remained vested in Robert Nelson, she was a subsequent incumbrancer, and as such would be a necessary party to be added in the Master's office after judgment in the foreclosure action. Upon becoming a party to the action, she could have obtained relief in a summary way. The demand

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was for payment of the whole amount secured by the mortgage, and, in default, foreclosure of the premises. The interest was overdue, and the mortgagee was entitled to call in the principal, and he had elected to do so. Consequently a party to the action by reason of an interest in the equity of redemption, was entitled to hold him to acceptance of the principal as well as the overdue interest: *Cruso v. Bond* (1882), 1 O.R. 384; *Praed v. Hull* (1823), 1 S. & S. 331; *Lawrence v. Humphries* (1865), 11 Gr. 209. This right depends upon the inherent jurisdiction of the Court rather than upon the provisions of 7 Geo. II. ch. 20 (Imp.), and technically appears to be confined to those made parties to the action by writ, but when the rule was first established in England it was the practice to make all subsequent incumbrancers, as well as all owners of the equity, parties to the foreclosure bill, and they were thus entitled to the benefit of the rule: see *Paynter v. Carew* (1854), Kay App. xxxvi. Under the modern practice it seems reasonable that upon the institution of an action for foreclosure or sale of mortgaged premises, not only those who are properly parties defendants in the first instance, but also those who would subsequently be proper parties either as interested in the ownership of the equity or as subsequent incumbrancers, should be entitled to pay the mortgagee's claim in the action. But in order to acquire that right they should adopt the proceedings in the action and avail themselves of them. The right to insist upon the mortgagee receiving the principal before arrival of the time for payment according to the proviso, only arises by reason of the mortgagee's election made in the action. The right to hold him to this election is not a general right, but is given by the course of the Court to the parties to the action upon their complying with certain requisites.

It is not open to a party to insist upon the election made in the foreclosure action and at the same time ignore the proceedings, and by an independent action seek to take the matter out of the mortgagee's hands. If he adopts the proceedings for the one purpose, he must adopt them for all incidental purposes. The plaintiff insists that she was entitled to require the defendant to accept the whole amount of the mortgage moneys and assign or discharge his mortgage. It is

clear that if the defendant had not commenced proceedings there would be no such right, for the time for payment of the principal moneys had not arrived: *Brown v. Cole* (1845), 14 Sim. 427. She was, therefore, driven to avail herself of the foreclosure proceedings, and her proper course was to apply to be added under Rule 206. I do not think any difficulty would have been experienced in adding her under this rule and the modern practice. In *Kino v. Rudkin* (1877), 6 Ch. D. 160, an action against the proprietor of a building to restrain the obstruction by him of the plaintiff's ancient lights, the defendant assigned all his interest in the premises *pendente lite*, and at the trial the new owner applied to be added as a party defendant under the English order corresponding to Rule 206. Fry, J., said: "I do not think there is any necessity for (the assignee's) presence. As the assignment was made to him *pendente lite*, I think he would be bound by the proceedings. But it is very reasonable that he should be made a party, and I will make an order that he be added as a defendant, he submitting to be bound." This was at the trial, but the same order might have been made at any prior stage. In *Wilson v. Church* (1878), 9 Ch. D. 552, there was, amongst other things, an application made under the English order by a person who claimed to be interested in the litigation adversely to the plaintiff, and whose rights and interests were not likely to be protected by the defendants then before the Court, to be added as a party defendant. Sir George Jessel, M.R., said (p. 559): ". . . But it does not at all follow that he is not entitled to be made a party. He has an interest even as an individual. . . He not only has an interest but a substantial interest." See, also, *Ferris v. Ferris* (1883), 9 P.R. 443.

I cannot doubt that if the plaintiff herein had applied in the foreclosure action the Court would have considered, as these learned Judges did in the cases before them, that it was very reasonable that she should be made a party. And she could then have held the defendant to his election to receive the whole of the mortgage money. But, instead of adopting this convenient and comparatively inexpensive proceeding, she made a tender and demand which the defendant was not bound to accept outside of the action, and, on his refusal, brought an

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action of her own. And not only so, but she made an application in this action to Meredith, J., at the trial of the foreclosure action, for an injunction to restrain the proceedings therein, which was refused. She seems to have done her best to deprive herself of the benefit of that action, and to have preferred to adopt her own course. The defendant was not bound to accept the tender of the whole amount made in the way and under the circumstances disclosed in the evidence. He was entitled to treat the plaintiff as not in a position to insist upon the principal of the mortgage being payable, and to refuse to assign or release his mortgage on any terms. The correspondence, however, shews that he was willing to be redeemed provided terms were agreed upon. But no agreement was reached before the plaintiff commenced this action. The plaintiff, therefore, fails in the main object of her action. But, in view of the pendency of the foreclosure action, and having regard to the position the plaintiff might be placed in unless she is permitted to avail herself of her right to become a party thereto, she should be secured against prejudice in that respect. Strictly, the action ought to be dismissed, but this would now deprive the plaintiff of any right to redeem in the foreclosure action. On the other hand, an order has been made staying all proceedings in the foreclosure action, and there has been no appeal therefrom. The defendant asked to be allowed to appeal from the order, but the leave should only be granted and the stay of proceedings removed upon an agreement by the defendant to consent to an order adding the plaintiff as a party defendant to the foreclosure action, and letting her in to redeem on payment of the amount found due by the Master, with subsequent interest. Upon the parties accepting these terms, this appeal should be allowed, and the judgment varied by declaring the plaintiff entitled to come in under the judgment in the foreclosure action and redeem the defendant's mortgage, the proper form of reconveyance, discharge or assignment to be settled by the Master at Stratford in the event of the plaintiff making redemption.

The terms of the certificate may be spoken to in Chambers in case of difference between the parties.

The plaintiff must pay the costs of the action and appeal.

ARMOUR, C.J.O., and OSLER, J.A., concurred.

Appeal allowed.

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Executors and Administrators—Accounts—Surrogate Court—Estoppel.

The surrogate courts of Ontario are invested with the authority and jurisdiction over executors and administrators, and the rendering by them of inventories and accounts, conferred in England on the Ordinary under 21 Hen. VIII., ch. 5, the effect of Rule 19 of the surrogate court rules of 1892, as limited by sec. 73 of the Surrogate Courts Act, R.S.O. 1897, ch. 59, being to bring the practice back to that in force under the ancient statute.

It is not only the duty of an executor or administrator to file an inventory and render an account when duly called upon to do so, but it is his privilege to do so voluntarily in any case in which he is liable to be called upon, and this privilege, in case of his death, extends to his personal representative, though not at the same time the representative of the original testator, and even though there is a surviving representative of the original testator.

Where, therefore, the executors of an executor brought into the proper surrogate court an account of the dealings of their testator with the assets of the estate of the original testator, treating in the account as cash received by the accounting executor the amount of a certain promissory note, and the account was audited and approved after due notice to the surviving executor of the original testator, it was held in an issue in the High Court between the surviving executor of the original testator and the executors of the deceased executor, upon pleadings so framed as to raise not only the question of the property in this note but also the question of the right to the proceeds thereof, that the audit and approval of the account were a binding adjudication as against the surviving executor, that the proceeds of the note were payable to the estate of his deceased co-executor.

Judgment of Falconbridge, C.J., affirmed.

APPEAL from the judgment at the trial.

The appellant is the surviving executor of one William Cunnington who died on the 14th of August, 1896, having made his last will and codicil thereto, dated the 4th of December, 1893, and the 27th of January, 1896, respectively, of which he appointed the appellant and one Jacob Cunnington executors. These two accepted probate and acted as executors until the death of Jacob Cunnington on the 11th of March, 1898. Jacob Cunnington had been what is termed the acting executor, that

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is, he appears to have assumed the greater burden of the administration of the affairs of the testator's estate and to have received the chief part of the assets.

Among the assets belonging to the testator which came to the hands of the executor Jacob Cunnington was a promissory note for \$600 payable to the testator or bearer one year after date and made by three persons, viz., Daniel Cunnington, Thomas Cunnington and William T. Cunnington. Jacob Cunnington made a will of which he appointed the respondents executors. After his death, upon search made by his executors among the papers which he had belonging to William Cunnington's estate, the note in question was found, and it being naturally supposed that it was still an asset of William Cunnington's estate it was with other papers handed to the appellant as surviving executor of that estate.

On the 9th of January, 1900, the respondents applied to the Judge of the surrogate court of Peel for, and obtained from him, an appointment to examine, audit, and pass the accounts of Jacob Cunnington as executor of William Cunnington's estate. The learned Judge appointed the 15th of January, 1900, and directed that all persons interested in the estate attend, and that a copy of his appointment be served on the appellant at least five days before the appointed day. Service of a copy of this appointment and order was on the 9th of January accepted on behalf of the appellant by a firm of solicitors in Brampton, and no objection has been taken to their authority. They forwarded it to him and he received it before the appointed day. It is contended by the appellant that the appointment was not proceeded with, and that the matter was allowed to drop and was not taken up again until the 10th of February, 1900, when another appointment was given for the 16th of February. But this does not appear to be correct. The proceedings commenced on the 9th of January were continued by adjournment and the appointment for the 16th of February was a continuance of the original matter. On the 2nd of February an application was made to the Judge of the surrogate court on behalf of the appellant for an appointment to examine, audit, and pass his accounts as executor of William Cunnington's estate, and an appointment was given for the 9th. This was from time to

time adjourned, and eventually was consolidated with the other proceeding for the purpose of taking evidence.

On the 12th of January, 1900, after service of the appointment and order of the 9th of January, the appellant commenced an action against the makers of the promissory note. The defendants in that action made application to the local Judge of the county of Peel for leave to pay the amount of the said promissory note into Court and for an order directing the appellant and respondents to proceed to the trial of an issue as to the property in the said note and the right to the proceeds paid into Court, grounding the application on proof of claims thereto being made by the respondents as well as the appellant. The application was first before the local Judge on the 26th of January, 1900, and was then adjourned, and finally, on the 13th of February, an order was made that the makers of the note be at liberty to pay into Court the sum of \$600, with interest from the 20th of March, 1899, less their costs, and that upon such payment the makers be discharged from further liability; and further that the appellant and respondents proceed to the trial of an issue in the High Court of Justice as to whether the promissory note was the property of the respondents as executor and executrix of Jacob Cunningham, or of the appellant as surviving executor of William Cunningham.

At this time there were pending in the surrogate court the two proceedings for the taking and passing of the accounts of the dealings of the appellant and Jacob Cunningham with William Cunningham's estate. The substantial question with regard to the note was into whose hands the proceeds should be committed, and as that would be dependent upon the result of the account taking, the more correct and reasonable order to have made would have been that the final disposition of the amount paid into Court be deferred until the accounts were passed. The determination of the bald question as to in whom the property in the note was vested was of little importance when it could be seen which of the parties was entitled to receive the amount out of William Cunningham's estate. It is to be observed, however, that the order did not confine the parties to the form of an issue but directed the delivery of a statement of claim, defence and reply. Wider scope was thus

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given, and, as will be seen, when the parties did proceed to trial they came down upon an issue which substantially involved the question of the destination of the fund in Court.

The money was paid into Court but no further proceedings towards trying the issue directed were taken for some time. The parties proceeded with the accounting in the surrogate court, and on the 13th of March, 1900, the surrogate Judge issued his order or certificate and amongst other things stated that he had found that Jacob Cunnington had cashed the note in question whereby he became the owner of and entitled to the same. This was not in strictness a correct expression of Jacob's position or rights in the premises. What would appear to have been the case was that Jacob had advanced on account of the estate an amount equal to within a few dollars of the value of the assets in his hands, including the promissory note in question, and he was, therefore, entitled to receive the amount of the note when paid by the makers. And the finding should have been to that effect. The accounts as finally dealt with by the surrogate court shew that he was charged with the amount as if he had received it. But no objection was taken to the form of the finding, the parties evidently being more interested in the substantial question. The appellant appealed to a Divisional Court from the order or certificate of the surrogate Judge on the grounds, amongst others, because the Judge erroneously found in the respondents' favour in respect of the promissory note, and because the said Judge erroneously rejected the evidence of one Thomas Morphy. The Divisional Court held that the evidence of Morphy should have been received, and on the 9th of April made an order referring the matter back to the surrogate Judge to take evidence and, if necessary, to make such variation in his order as upon hearing the evidence might appear to be just, but, except as to this and as to costs consequent on any variation that the Judge might make in consequence of the evidence, the order or certificate was not disturbed. The Judge afterwards received Morphy's evidence and certified that he made no variation in his order of the 13th of March. The appellant once more appealed to a Divisional Court and again urged amongst other grounds that the Judge was in error in finding that the note had become the

property of Jacob Cunningham. The Divisional Court on the 4th of September, 1900, dismissed the appeal.

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After the issue of the order or certificate of the 13th of March, and before the delivery of the statement of claim in the issue, the respondents' solicitor proposed to the appellant's solicitor that in view of the finding as to the note it would be reasonable not to proceed with the trial directed by the order of the 13th of February. The appellant's solicitor, however, insisted that the matter should be proceeded with, and pleadings were delivered which set forth all the proceedings to which reference has been made, and part of the relief claimed was payment to the respondents of the moneys in Court.

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The case came on for trial before Falconbridge, C.J., who held that the appellant was concluded by the proceedings in the surrogate court, and he pronounced judgment in the respondents' favour and directed payment to them of the moneys in Court.

The appeal was argued before ARMOUR, C.J.O., MACLENNAN, MOSS, and LISTER, JJ.A., on the 5th of February, 1901.

Armour, K.C., and T. J. Blain, for the appellant.

W. E. Middleton, for the respondents.

September 21. MACLENNAN, J.A.:—There is no ground for this appeal. Section 72 of the Surrogate Courts Act authorizes an executor or administrator to file in the surrogate court an account of his dealings with the estate, and provides that if the Judge has approved thereof in whole or in part, such approval, except in the case of mistake or fraud, shall be binding on all persons notified or present at the proceedings if the executor or administrator is subsequently required to pass his accounts in the High Court.

On the 9th of January, 1900, the plaintiffs, as executors of the deceased executor Jacob, obtained from the surrogate Judge an order to pass the accounts of their testator Jacob, as one of the executors of William Cunningham, deceased. That order was served on the defendant, the other executor of the original testator William, on the same day, and proceedings were regularly continued under that order with notice to the defendant until the 13th of March, 1900, when the accounts of the

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dealings of the plaintiffs' testator with the estate of the original testator were approved, including the item of the note for \$600 now in question. What the learned Judge in substance states with regard to that note is that the executor Jacob treated the amount of it as cash in his hands, and duly applied it for the purposes of the estate, although he had not received payment of it, whereby he became the owner of and entitled to the note.

The defendant seems to have been advised that as he was the surviving executor of the original testator he was the only person who could apply to pass the accounts of the estate; and so he protested against the proceedings before the surrogate Judge, and struggled against them in a succession of appeals, in which he was unsuccessful.

What the statute authorizes to be done by the surrogate Judge is, not to pass the accounts of the estate, or to administer the estate, but merely to approve, in whole or in part, of an account of the dealings of an executor or administrator with an estate. I see no reason why one of two or more executors might not submit his own dealings with the estate for approval, independently of the other or others; and if so, there can be no objection to that being done by the executor or administrator of one of several executors, though one or more be still living.

On the 12th of January, 1900, after having been served with the plaintiffs' order and appointment to pass their testator's accounts, the defendant commenced an action on the note against the makers, and they being notified that the plaintiffs claimed it, obtained the interpleader order and issue, the judgment in which is the subject of the present appeal.

The learned Chief Justice at the trial held that the defendant having been notified, and also having been present at the proceedings before the surrogate Judge, was bound by his approval of the proceedings of the plaintiffs' testator in respect of the note in question. I think that in so deciding the learned Chief Justice was right. The note not having been in fact paid it may be that the legal property in it, upon Jacob's death, survived to his co-executor, the defendant; but there can be no doubt that Jacob having charged himself as executor with the amount of the note, and having applied the money for the benefit of the estate, as if he had received it, became in equity

the owner of the note, and entitled to recover the money from the makers for his reimbursement and indemnity. The principle applicable is the same which accords to a trustee a lien upon the trust estate for advances honestly and properly made for the benefit and in furtherance of the trust.

I ought perhaps to make a remark upon the words of the statute, which seem to limit the application of the section to the case where "the executor or administrator is subsequently called upon to pass his accounts in the High Court." The plaintiffs, as executors of Jacob, are undoubtedly liable to account to the defendant as surviving executor, who alone now represents William's estate. In the present action they are virtually required to account to him in respect of this note, which is one of the items in the account passed by the surrogate Judge.

I think the section is applicable, and that the judgment for the plaintiffs was right.

Moss, J.A.:—(After stating the facts as above set out). The appellant claims a reversal of the judgment chiefly on the grounds that the proceedings in the surrogate court were not an adjudication upon the question directed to be tried, that the surrogate court had not jurisdiction to deal with the accounts of the transactions of Jacob Cunnington with William Cunnington's estate upon an application made by Jacob's executors; that it was not competent for Jacob's executors to take proceedings in respect of such accounts, but that they could only be taken by parties interested in William's estate and then against the surviving executor of William's estate only, or if an executor was entitled to voluntarily take proceedings to pass the accounts the appellant as surviving executor was the only one who could do so; and that the proceedings before the surrogate court were *coram non judice*. It was also objected that under the order of the 13th of February, the High Court was seized of the question as to the property in the promissory note and that the surrogate court Judge had no jurisdiction or authority to deal with it pending the trial of the issue directed, and that the learned Chief Justice should have proceeded to try the issue as directed by the order.

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All the objections except the last were taken on the first appeal made by the appellant to a Divisional Court, but they were not allowed.

By two judgments of a Divisional Court there has been a distinct adjudication adverse to the appellant upon the questions raised by these exceptions, and as against him, and altogether apart from any general rule of estoppel, these matters might well be regarded as *res adjudicata*.

I have, however, come to the conclusion that on other grounds as well the judgment appealed from should be upheld.

The dates of the proceedings shew that the surrogate court was seized of the matter before the order of the 13th of February was pronounced. If it had jurisdiction and was rightfully seized of the matter, the direction of the local Judge as to the trial of an issue regarding the note did not oust the jurisdiction. And if before the trial of the issue it was rightfully determined by the surrogate court having jurisdiction that one of the parties to the issue was entitled to the money paid into Court, there seems no good reason for saying that the Judge trying the issue should not, upon pleadings framed as they are in this case, give effect to that finding.

The substantial question therefore is, had the surrogate court jurisdiction, and was it rightfully seized of the matter?

The surrogate courts of the Province are invested with the authority and jurisdiction over executors and administrators and the rendering by them of inventories and accounts conferred in England on the Ordinary under 21 Hen. VIII., ch. 5, except in so far as the same may have been revoked by subsequent legislation or rules. Rule 19 of the surrogate court rules of 1892, as limited by the Law Courts Act, 1895, sec. 30, now sec. 73 of the Surrogate Courts Act, R.S.O. 1897, ch. 59, seems to bring the practice back to the practice under the ancient statute. According to modern practice under the statute of Hen. VIII. neither the executor or administrator in general cases exhibited any inventory unless he was cited for that purpose at the instance of a party interested: Williams on Executors, 9th ed., p. 841. In *Phillips v. Bignell* (1811), 1 Phillimore 239, the practice is thus stated by Sir John Nicholl: "The statute (21 Hen. VIII. ch. 5, sec. 4) requires executors and

administrators to exhibit inventories as part of their duty, without any proceedings to call upon them to do so. The modern practice, however, is certainly not to render an account unless it shall be called for; but the executor must remember that he has bound himself by his oath to render a just account when he is by law required."

It is not only the duty of the executor or administrator to file an inventory and render an account when duly called upon to do so, but it has always been his privilege to do so voluntarily in any case in which he is liable to be called upon, and in order to exonerate himself from liability it is always a most prudent thing for him to do. See *Kenny v. Jackson* (1827), 1 Hagg. Ecc. 105. Not only is the executor or administrator himself liable to be called upon, but so also is his personal representative, although not at the same time the representative of the first testator or intestate, upon a reasonable presumption being raised that any part of the effects of the first testator or intestate has travelled into his hands: *Ritchie v. Rees* (1822), 1 Addams, at p. 153. And this is so even where there is a surviving executor of the original testator: *Gale v. Luttrell* (1824), 2 Addams 234. It follows that being liable to be called upon, he may voluntarily undertake to render the inventory and account.

Upon the facts shewn in this case the respondents were liable to be called upon to render an account, and having themselves instituted proceedings to that end and submitted themselves to the Court, there was jurisdiction to proceed under Rule 19 of the Surrogate Court Rules, 1892, and the Court was properly seized of the accounts when brought in and submitted. Sub-section (a) of the Rule gives the widest possible powers to the Judge in proceeding to audit accounts so brought in. They seem to include the power to make all just allowances and generally to enquire, and adjudge, as to all matters essential to the auditing of such accounts as fully as if the same had been specially referred. See Con. Rules of Practice (1888), Nos. 57 to 59 inclusive, referred to in Rule 19 (a).

Lastly there comes sec. 72 of the Surrogate Courts Act, providing that where an executor or administrator has filed in the proper surrogate court an account of his dealings with the estate of which he is executor or administrator and the Judge

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has approved thereof in whole or in part, if the executor or administrator is subsequently required to pass his accounts in the High Court such approval, except so far as mistake or fraud is concerned, shall be binding upon any person who was notified of the proceedings taken before the surrogate Judge or who was present or represented thereat, and upon every one claiming under such person.

There appears to me no good reason why these provisions should not apply as well to proceedings on accounts voluntarily submitted as to proceedings on those filed after citation or order, and to accounts submitted by an executor of an executor although he is not the personal representative of the original testator.

Therefore, if the respondents were now required to pass Jacob's accounts in the High Court the approval given by the surrogate Judge would be binding upon the appellant, no mistake or fraud appearing. That being so, I think that, under the pleadings in this action, the adjudication and report made were properly held binding upon the appellant. Apart from any technical aspect of the case, there seems no good reason for holding him not bound by the result of the appeals he unsuccessfully made against the adjudication which he again sought to open up before the learned trial Judge.

The appeal should be dismissed.

ARMOUR, C.J.O., and LISTER, J.A., concurred.

Appeal dismissed.

R. S. C.

[IN THE COURT OF APPEAL.]

MCNEVIN v. CANADIAN RAILWAY ACCIDENT INSURANCE CO.

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Insurance—Accident Insurance—Change in Occupation—Exposure to Danger.

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An accident insurance policy in favour of a railway servant, described as a baggageman, and employed as such at a small railway station, provided that if the insured were injured "in any occupation or exposure" classed by the company as more hazardous than that stated therein, the amount recoverable should be reduced in a certain proportion, and also that injuries resulting from "voluntary exposure to unnecessary danger" were not covered. The insured while coupling cars received injuries which resulted in his death. It was shewn that at a small station like that in question a baggageman would not infrequently couple cars, and that the insured had often done this work although not strictly within the scope of his employment, this work being as a rule done by brakemen, and the occupation of brakeman was classed by the defendants as more hazardous than that of baggageman:—

Held, that hazardous "occupation or exposure" referred to in the policy was something of a permanent nature, and that the doing of isolated acts of a more hazardous nature did not change the insured's class or entitle the insurers to reduce the amount recoverable.

Held, also, *per* ARMOUR, C.J.O., that "voluntary exposure to unnecessary danger" means voluntary exposure to a danger which it is unnecessary for any one to expose himself to under the circumstances, and *per* MACLENNAN, J.A., that as the act of coupling was a necessary one, and as the insured might reasonably have thought that it was his duty to do the act, there was not a voluntary exposure to unnecessary danger. But *per* OSLER, and MOSS, J.J.A., that there was, the act being a voluntary one and its danger being apparent.

In the result the judgment of Falconbridge, C.J., 32 O.R. 248, in favour of the insured's representatives, was affirmed.

APPEAL by the defendants from the judgment at the trial, reported 32 O.R. 284.

The action is brought upon an accident insurance policy issued by the defendants, whereby they insured one Alexander McNevin against loss of time or death by accident in the sum of \$1,000. The insured was accidentally killed by a train of the Canadian Pacific Railway, and the plaintiff was the person to whom, by the terms of the policy, the insurance was made payable, in the event of the death by accident of the insured.

The defendants plead certain provisions and agreements in the policy, and in the deceased's application therefor, as a defence to the claim, in whole or in part.

The application bears date the 12th August, 1898, and is for "an accident policy to be based upon the order given herewith, and upon the following statement of facts, which I warrant to

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be true. 3. My occupation is fully described as follows : Baggage-man at station ; am employed by the C.P. Ry. Co. 5. I agree to have my occupation classed as ordinary. 13. I understand the classification of risks, and agree that for any injury received in any occupation or exposure classed by this company as more hazardous than those above stated, I shall be entitled to recover only such amount as the premiums paid by me would purchase at the rates fixed for such increased hazard.

I hereby agree that I will notify the company in writing of any change of address or occupation."

Upon this application the policy, bearing the same date, now sued upon, issued, whereby, in consideration of the warranties in the application, the defendants insured the deceased against loss of time "resulting from bodily injuries effected during the term of this insurance through external, violent and accidental means," and agreed to pay, in the manner specified, certain specified sums therefor ; or if death should result from such injuries alone, within ninety days from the happening thereof, to pay \$1,000 to Louisa McNevin, the mother of the insured ; and in the event of her prior death, to her legal representatives or assigns. "Provided as follows : 1. If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in the application, his insurance shall be only for such sums as the premiums paid by him will purchase at the rates fixed for such increased hazard.

4. This insurance does not cover accident nor death resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or effected : Voluntary or involuntary taking of poison, or contact with poisonous substances (except in cases where it occurs to insured whilst necessarily exposed in the discharge of the duties pertaining to the occupation under which he is insured), voluntary over exertion, voluntary exposure to unnecessary danger."

It appeared at the trial that the deceased was baggage-man or porter at Arnprior station, Canadian Pacific Railway. His duties were to clean the station, light the lamps, attend the switches, help to load and unload freight, and to seal cars. It was no part of his duties to couple or help to couple freight or

other cars, but he frequently did so of his own accord, though warned not to do so and to look out that he did not get hurt.

On the evening of the 30th July, 1899, an engine and van were standing at the station, waiting to be attached to a train of freight cars which was being backed up from McLachlan's yard, a siding about a mile from the station. The deceased went in between the van and the moving train to make the coupling, and as he made it, and before he could get out from between the van and the car to which he had coupled it, he was accidentally knocked down and killed. A companion who had come up with him on the train from MacLachlan's siding said he understood Carroll, one of the brakemen on the train, to ask him to make the coupling. This was denied by Carroll, who said that he had himself jumped off the train to get a coupling pin, and seeing none about signalled to stop; when the train struck the van he heard a shout and saw McNevin coming out from under the wheels. The van and car were found coupled, and though the witness did not see it done, he thought no one could have done it except McNevin.

It was proved that the occupation of a freight brakeman, if classed for insurance purposes at all, was classed as more hazardous than that of baggage-man or porter. The defendants' assistant general manager testified that all occupations came under classes; the more hazardous the occupation the higher the premium; that of baggage-man at a station was classed as ordinary, for which the rate was \$7.50 per \$1,000 per annum; the rate for an occupation classed as hazardous was \$15 per \$1,000. For freight brakemen the company issued very limited insurance, not exceeding \$500, for which the rate per annum was \$29. Were it possible to give a freight brakeman \$1,000, the rate would be \$47.

The station master said that in his opinion the coupling of cars was a little more dangerous than sealing cars. If he had his choice he would take the latter risk.

The defendants contend (1) that the deceased received his injury in the course of an occupation or exposure more hazardous than that of baggage-man, the occupation for which he was classed, and in respect of which they insured him, and they pay into Court \$159.57 in satisfaction of the plaintiff's claim, being

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an amount more than enough to cover any liability they may have incurred under clause 13 of the policy, being "such an amount as the premium paid by deceased would purchase at the rate fixed for the increased hazard." (2) That the injury which caused death was the result of an act which was no part of the duties of a baggage-man and, therefore, not covered by the risk they undertook; and (3) that death was the result of voluntary exposure on the part of the insured to unnecessary danger and so not covered by the policy.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, and MOSS, J.J.A., on the 15th of January, 1901.

A. E. Fripp, for the appellants. The contract of insurance in question is one specially adapted to railway employees and is based upon the special occupation of the insured as described in his application, which he warrants to be true, and the risk undertaken by the assurers is based upon the occupation of the insured as described by him. The applicant described his occupation as "baggage-man at station," and the evidence shews that the deceased received the injuries causing death while in the act of coupling cars, and that it was no part of his duty as baggage-man at station to engage in this work. The appellants submit that upon these facts clause 13 of the application and clause 1 of the policy apply, and that the assured's beneficiary can recover at most only the proportionate part of the policy which the appellants paid into Court. The learned Judge erred in his construction of the words "occupation or exposure." At the time the deceased received the injuries he was in the "occupation" of a brakesman and was exposing himself to a risk more hazardous than his contract of insurance allowed: *Standard Life and Accident Insurance Co. v. Martin* (1892), 133 Ind. 376; *Aldrick v. Mercantile Mutual Accident Association* (1889), 149 Mass. 457; *Eggenberger v. Guarantee Mutual Accident Association* (1889), 41 Fed. Rep. 172; *Knapp v. Preferred Mutual Accident Association* (1889), 53 Hun 84. The case comes also within clause 4 of the policy, viz., the voluntary exposure to unnecessary danger. The coupling of cars was no part of the deceased's duties, nor was there any obligation cast upon him to do this work. Even assuming that he was requested

to do so by one of the train's crew that would not make his act any the less a voluntary one. He deliberately went into a place of danger and so committed a breach of this provision: *Cornish v. Accident Insurance Co.* (1889), 23 Q.B.D. 453; *Sawtelle v. Railway Passenger Assurance Co.* (1878), 15 Blatch. 216; *Tuttle v. Travellers Insurance Co.* (1882), 134 Mass. 175; 1 Am. & Eng. Encycl. of Law, 2nd ed., p. 307.

Aylesworth, Q.C., for the respondent. The learned Chief Justice has rightly construed the word "occupation" as meaning occupation or employment as a usual business, not as a casual or isolated act or series of casual acts in the intervals of ordinary employment: May on Insurance, 3rd ed., p. 1228; *Providence Life Insurance Co. v. Martin* (1869), 32 Md. 310; *Stone v. United States Casualty Co.* (1871), 34 N.J. Law 371. If any ambiguity is introduced by the use of the word "exposure" the doubt (if any) thereby created should be resolved in favour of the respondent. It is a commendable rule recognized in a number of cases that in case of doubt, in a policy of life insurance, the construction most favourable to the insured will be adopted, and that a forfeiture will not be enforced unless unavoidable: *Cornish v. Accident Insurance Co.*, 23 Q.B.D. 453; 1 Am. & Eng. Encyc. of Law, 2nd ed., pp. 302, 306; *Standard Life and Accident Insurance Co. v. Martin*, 133 Ind. 376. The word "exposure" in the clause has reference to and is a mere expansion of what precedes. It means exposure in connection with the new and more hazardous occupation. The learned Chief Justice has also found, and the respondent submits has rightly found, that the insured did not come to his death by any voluntary exposure to unnecessary danger. The burden is on the appellants to prove that the deceased voluntarily exposed himself to unnecessary danger, and they have not shewn that he did not, under the circumstances, believe it to be his duty to make the coupling in compliance with the order or request of Carroll, the brakesman: 1 Am. & Eng. Encyc. of Law, 2nd ed., p. 308 (note); *Providence Life Insurance Co. v. Martin*, 32 Md. 310. There was nothing in the act of coupling the cars which to a person in the position of the deceased acting with reasonable and ordinary prudence was dangerous.

Fripp, in reply.

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October 16. ARMOUR, C.J.O.:—The burden of proving that the deceased met his death by “voluntary exposure to unnecessary danger,” according to the true meaning of this exception in the policy, lay upon the defendants, and in my opinion they did not discharge it.

The deceased went between the van and the last car of a freight train for the purpose of coupling the van to the last car and performed the coupling, and was seen crawling out, whether from under the van or the last car did not appear, the wheels having passed over his legs, and it was not known how he came to be run over—whether he was knocked down or whether he stumbled and fell or how otherwise.

There was no direct evidence whatever that coupling cars was dangerous, nor was there any evidence from which it could be reasonably inferred that coupling cars was dangerous.

The fact that the deceased was killed in coupling cars furnished no evidence from which it could be reasonably inferred that coupling cars was dangerous any more than it could be reasonably inferred from the fact of a man walking in King Street slipping, falling and being killed that walking in King Street was dangerous.

The fact that the defendants classed the occupation of a brakesman as more hazardous than that of a baggage-man furnished no ground for reasonably inferring that coupling cars was dangerous, for although one of the duties of a brakesman was to couple cars, it was not shewn that it was by reason of a brakesman being required to couple cars that the occupation of a brakesman was classed by the defendants as more hazardous than that of a baggage-man.

One of the deceased's duties as baggage-man was sealing cars and this evidence was given: “Q. Is it (coupling cars) any more dangerous than sealing cars? A. I do not know. I would not say.” On cross-examination: “Q. Coupling of cars, when the cars are coming together, in your opinion would it not be much more dangerous than sealing cars? A. I think it would be a little probably. I would not like to say which is most dangerous. Q. Which risk would you rather take? A. If I had my choice I would rather affix the seals.”

It could not be reasonably inferred from this evidence that either sealing cars or coupling cars was dangerous.

Riding in a carriage might be said to be more dangerous than riding in a street car, but it would not be reasonable to infer from this that either was dangerous.

Whether or no coupling cars is dangerous is a fact to be proved and according to the proof the Judge must determine whether it be so or not, and he is not at liberty to make use of his own knowledge in determining it.

In *Hurpurshad v. Sheo Dyal* (1876), L.R. 3 Ind. App. 259, the Judicial Committee said (at p. 286): "It ought to be known, and their lordships wish it to be distinctly understood, that a judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts. If the means of knowledge of the Judicial Commissioner of the facts spoken to by him in his judgment, as depending upon his own knowledge, were capable of being tested, it would probably turn out that it depended upon mere rumour or hearsay, and that his evidence as to those facts would not be admissible if he had been examined as a witness." See also *Regina v. Petrie* (1890), 20 O.R. 317.

Were I to be a witness as to whether coupling cars is dangerous my evidence would be mere hearsay. I have heard it said that it is; I have no experience of whether it is or is not; but in a trial I have heard it sworn by a witness apparently credible and experienced in coupling cars that there is no danger whatever in it, and my brother Meredith, C.J., informs me that he has heard the same thing sworn in a trial before him.

When I say that there was no direct evidence adduced, and no evidence adduced from which it could be reasonably inferred that coupling cars was dangerous, I mean by the word "dangerous," dangerous to life or limb, and this is the proper sense in which to use the word, having regard to the terms of the policy sued upon.

I might well hold on this ground that this appeal should be dismissed, but as it has been assumed that coupling cars is dangerous I will deal with the case on that assumption, and this brings me to the determination of the true meaning of the exception "voluntary exposure to unnecessary danger."

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The deceased was insured as a baggage-man and paid the premiums required by the defendants to be paid by a person in that employment, but his insurance was not limited to accidents happening to him while performing the duties of that employment, but extended to accidents happening to him whether while performing the duties of that employment or not.

This exception is used not only in this policy and in the other policies issued by the defendant company, but it is in general use by accident insurance companies in policies insuring against accident not only persons in all sorts of employments, but persons in no employment, and the same interpretation must be placed upon it in whatever policy it may appear.

I do not think that this exception can be interpreted to mean voluntary exposure to a danger which it was unnecessary for the insured to expose himself to, for this would render a policy against accidents issued to a person having no employment practically useless, for he would hardly meet with an accident in doing anything which it was necessary for him to do, and if he met with an accident in doing anything which it was unnecessary for him to do he would be exposing himself to unnecessary danger.

In my opinion the proper interpretation to be put upon this exception "voluntary exposure to unnecessary danger" is voluntary exposure to a danger which it is unnecessary for any one to expose himself to under the circumstances.

And this interpretation is consistent with the decisions in all the cases I have met with dealing with this particular exception, and any other interpretation of it is inconsistent with many of them.

In *Providence Life Insurance Co. v. Martin*, 32 Md. 310, the exception in the policy was "by his wilfully exposing himself to any unnecessary danger or peril," and the insured was a locomotive engineer in the employ of a railroad company, and whilst backing his engine upon a down grade, with a car in front, as a precaution to check the speed he directed the fireman to run it and went upon and over the tender to get into this car to draw the brakes and in doing so slipped and fell between the car and the tender and was instantly killed by the tender passing over his body, and the Court in giving judgment

said: "The company contracted in plain unequivocal terms to insure the deceased against any accident save those embraced in the enumerated exceptions, and every injury caused by accident, save those specially excepted, is within the meaning of the policy and its conditions. It is not, therefore, a substantive defence to this action, even if the proof established the fact that the deceased, at the time of the injury, was endeavouring to perform the duty of a brakeman, or was acting out of the line of his own duty as engineer, or even contrary to the rules and regulations of his employers, for, unless he received the injury by wilfully exposing himself to unnecessary danger or peril within the meaning of the exception, the accident is covered by the policy"; and it was held that in doing what he did he was not wilfully exposing himself to any unnecessary danger or peril.

The putting on the brakes in that case was a danger which it was unnecessary for the engineer to expose himself to, but it was a danger which it was necessary for someone to expose himself to, and, therefore, it was not an unnecessary danger within the meaning of that exception, but a necessary danger.

In this case the coupling of the cars, if a danger, was a danger that it was unnecessary for the deceased to expose himself to, but it was a danger that it was necessary for some one to expose himself to under the circumstances, and was, therefore, not an unnecessary danger within the meaning of the exception, but a necessary one.

The defendant company framed this policy and if they meant to except voluntary exposure to a danger which it was unnecessary for the insured to expose himself to they could readily have made it clear, but having left it in doubt whether they meant that or a danger which it was unnecessary for any one to expose himself to under the circumstances, they cannot complain if the exception is construed, as it ought to be, most strongly against them.

I refer to the cases collected in the note to *National Accident Society v. Dolph* (1899), 38 C.C.A. 1, and in the note to *Fidelity and Casualty Co. v. Chambers* (1896), 40 L.R.A. 432.

In my opinion the appeal should be dismissed with costs.

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OSLER, J.A. :—(After stating the facts as above set out). The first question is whether the case is one which comes within the 13th clause of the application and clause 1 of the policy under which a limited recovery may be had to the extent of the sum paid into Court. The answer to this question depends upon the meaning of the words "if the insured is injured in any other occupation or exposure," etc. Do these words "occupation or exposure" relate to a change of employment or occupation, during which new or changed occupation the injury happens, or to the particular act which causes it as being one pertaining to a different occupation from that stated in the application? In other words, are the clauses intended, as the defendants say they are, to meet the case of an injury caused by any isolated act which may pertain to a different employment; or, which is the plaintiff's contention, do they refer to an entire change of occupation or employment and an injury occurring in any manner (not specially excepted) during the period of the latter?

On this branch of their defence the defendants offer to pay the reduced indemnity. The plaintiff refuses to accept it, alleging that as the deceased had not changed his occupation, the clauses in question do not apply. On the whole I am of opinion that the construction argued for by the plaintiff is the right one, and that she is entitled to recover the whole sum insured unless defeated by some other provision of the policy.

It is evidently contemplated by these clauses that the insured, who has declared that he understands the classification of risks, and who has agreed to notify the company in writing of any change of occupation, is to be at liberty to abandon the occupation in which he was insured at the date of his application and to engage in another or different one without terminating the policy, subject only to the reduction of his claim thereunder should the new occupation be of a more hazardous nature than the former. The right to indemnity is not limited to the case of accidents incident to the occupation, although the character of such occupation, and the probability that such accidents will happen, are naturally mainly regarded by the company in estimating the risk. The injury might be caused by any accident to which one is exposed in the ordinary course

of every day life and yet be within the terms of the policy as an injury caused by external, violent and accidental means. And if the insured, not having changed his occupation, happened to meet with an injury in doing some isolated act pertaining to a different occupation, I think that his claim, though it might be defeasible under another clause of the policy, would not be affected by the clauses now in question. They are not very accurately framed, but, in my opinion, they point to the change by the assured of the occupation or calling which was classed in the policy, the adoption of a different one and an injury occurring during the period of the latter whether incident to it or not. I attach no particular force to the word "exposure." When read with the context it is evidently only an amplification or equivalent of the word "occupation" with which it is coupled, and it is not otherwise the subject of classification by the company.

I assume, therefore, as the deceased had not changed his occupation and was still baggage-man or porter and nothing else, the defendants fail on this part of their defence, and the plaintiff is entitled to recover the whole of the sum insured unless the deceased lost his life in consequence of voluntary exposure to unnecessary danger within the meaning of the policy.

In the case of *Neill v. Travellers Insurance Co.* (1885), 12 S.C.R. 55, the condition relied upon by the defendants was: "No claim shall be made under this policy when the death or injury may have happened in consequence of voluntary exposure to unnecessary hazard, danger, or perilous adventure." The deceased was killed by a train colliding with his carriage which he was driving on a dark night across the railway tracks in the company's station yard at a place where there was no roadway. Strong, J., said: "It being once admitted that the locality at which the accident occurred was a dangerous one, and that being there was an exposure to danger, it was not shewn that the deceased was there otherwise than of his own will, and he must, therefore, be taken to have been there voluntarily, as every act of man must be presumed to be voluntary until the contrary is proved. Again, it was also for the plaintiff to have proved that the presence of the deceased at this dangerous spot

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was caused by some reasonable necessity, if she relied on the fact that the deceased had exposed himself to this danger for some necessary purpose, but of this, also, there is an entire failure of proof." It was held that the deceased had voluntarily gone, unnecessarily, into a place of danger and that the plaintiff was not entitled to recover: S.C. (1882), 7 A.R. 570; 31 C.P. 394.

In *Cornish v. Accident Insurance Company*, 23 Q.B.D. 453, a policy against accidental death or injury excepted from the risks insured against accidents happening by the exposure of the insured to "obvious risk of injury." Deceased, who was not shewn to have been short-sighted or deaf, met his death by attempting in broad daylight to cross the main line of a railway in front of an approaching train by which he was run over and killed. In this case also it was held that the accident was one which came within the exception and that the company was not liable. The language of the policy admitted of a construction more favourable to the insured than, I think, does the one before us, but the observations of Lindley, L.J., may be usefully quoted for their general bearing upon the construction of instruments of this kind: "The object of the contract is to insure against accidental death and injuries, and the contract must not be construed so as to defeat that object, nor so as to render it practically illusory. A man who crosses an ordinary crowded street is exposed to obvious risk of injury; and, if the words in question are construed literally, the defendants would not be liable in the event of an insured being killed or injured in so crossing, even if he was taking reasonable care of himself. Such a result is so manifestly contrary to the real intention of the parties that a construction which leads to it ought to be rejected. But, if this be true, a literal construction is inadmissible, and some qualification must be put on the words used. . . . The real difficulty is to express the necessary qualification with which the words must be taken. In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt or magnifying an ambiguity, when the

circumstances of the case raise no real difficulty." It was held that under the language of the policy it was plain that at least two classes of accidents were excluded from the risks insured against, viz., (1) accidents which arose from an exposure by the insured to the risk of injury which risk was obvious to him at the time he exposed himself to it; and (2) accidents which arose from an exposure by the insured to risk of injury which risk would be obvious to him at the time if he were paying reasonable attention to what he was doing.

Applying to the instrument in hand the principle enunciated in the cases cited, it may be conceded that its language was not intended to be taken literally or in such a way as to render the contract illusory for either party. What is excepted from the risks insured against is the voluntary exposure to unnecessary danger. Necessary dangers there may be; they are not defined, and they may be other than those incidental to the occupation of the insured. "'Tis dangerous to take cold, to sleep, to drink," and, in the course of everyday life, dangers are incurred in the pursuit of one's ordinary vocation or avocation which, by taking thought, might be avoided. But it cannot have been intended that the insured should, as it were, live with his policy constantly in mind, and regulate his actions by a consideration of what it may require or forbid. He is not obliged to withdraw himself from affairs or amusements—to "easy live and quiet die"—because by doing so he might avoid dangers to which he would otherwise be exposed. He might take part in the ordinary games of the country, cross a crowded street, or even in a sudden emergency, in order to save life or property or to accomplish some important business of his own, imperil life or limb. As is well stated in a recent work, *The Cyclopædia of Law and Procedure*, p. 253: "It will be assumed that the parties to the contract contemplate that the insured will be exposed to the dangers incident to his occupation and the insured will not be precluded from doing such acts and performing such duties as are simply incident to and connected with the daily life of men engaged in any and all occupations, nor will he be prevented from engaging in any mere acts of exercise, diversion or recreation." In such cases, though the exposure would be voluntary, it might well be held not to be unnecessary

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having regard to the ordinary habits of life and society or the promptings of humanity. Can the same thing be said of the act by which the unfortunate assured met with his death in this case? It was a voluntary act and one known to him to be inevitably accompanied by some degree of danger, greater or less according to the expertness of the performer. Had the insured adopted a new occupation his policy would have placed him in the appropriate indemnity class and the dangers incident to that occupation would have been excluded from the class of unnecessary dangers. But officiously to perform a dangerous act, and, *a fortiori*, one pertaining to a different occupation from that classed in the policy, appears to me to be, upon any fair reading of the exception, a voluntary exposure to an unnecessary danger as an act done without any reasonable necessity therefor. In my opinion, therefore, the judgment at the trial should be reversed and judgment entered for the defendants.

MACLENNAN, J.A.:—I am of opinion that the judgment appealed from is right and ought not to be disturbed.

The occupation of the plaintiff's son was that of a porter or baggage-man at the Arnprior station of the Canadian Pacific Railway. He was insured by the defendants as a baggage-man. The company have different rates for different employments in the railway service, the rate for a brakeman, for example, being much higher than that for a baggage-man.

The defence is rested on two grounds. First, the application and policy provide that for injury received in any occupation or exposure classed by the company as more hazardous than that of a baggage-man the amount to be recovered shall only be in proportion to the premium payable for the more hazardous occupation. The defendants tendered to the plaintiff a sum based on the premium rate for a brakeman, which is much higher than for a baggage-man, but the tender was refused. The other defence is rested on a stipulation in the policy that the insurance does not cover accident resulting from "voluntary exposure to unnecessary danger."

I agree with the learned Judge that there is nothing in the first ground of defence. The deceased was not a brakeman.

Coupling is usually one of the duties of a brakesman, but he has many other duties besides, and it does not appear that the defendants have fixed any rate for the hazard of coupling. I think, therefore, the act of coupling done by the deceased just before he was killed was not an occupation or exposure within the clause of the application and policy relied upon.

There is more difficulty in the other objection, although the defendants must have thought there was no ground for it when they made a tender at brakesman's rate. If this objection is good the plaintiff is not entitled to recover anything. The tender having been refused, however, this objection is no doubt open to the defendants for what it is worth. The question then is, whether the learned Judge was wrong in holding that the present was not a case of voluntary exposure to unnecessary danger within the meaning of this policy. The evidence is that the insured was a baggage-man, or porter, at a small railway station. In his application he states that his "occupations are fully described as follows: baggage-man at station." The evidence is that some of the things he had to do were to clean the station, light the lamps, attend the switches, load and unload freight, and seal cars, and that in sealing cars he had to go between them; but his duties were not defined or laid down in any form by the company, or in any book of rules or regulations. This is the evidence of the station-master at the same station. He says he has seen the deceased coupling cars, but not very often, and that it was not his duty to do so. He also says that he would think coupling would probably be a little more dangerous than sealing, but he would not like to say which was most dangerous. This witness was subpoenaed by the defendants but called by the plaintiff. The conductor and brakesman of the train which was coupled to the van by the deceased were called for the defence. It seems the train had been down upon a siding in McLachlan's yard, about a mile away. The deceased was there and came up to the station with the train, which consisted of 17 or 20 loaded freight cars, and came into the station, with the engine behind, backing the train towards the van to which it was to be coupled. When the train slowed up as it approached the van the deceased must have alighted, procured a coupling pin, and proceeded to make

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the coupling, which he did successfully, but was immediately afterwards seen crawling from beneath the train, the wheels having passed over his legs. The conductor says he did not ask him to make the coupling, and that it was the business of the brakesman to do that. Carroll, the brakesman, says that when they came near the van, he knew there was no pin on the van, and he jumped off to get a pin, but could see no pin round, and immediately afterwards saw the deceased crawling out from under the wheels. A witness named Hudson, one of the defendants' witnesses, says that he came up in the train from McLachlan's siding, and heard Carroll, the brakesman, speak to deceased, and he understood him to ask deceased to make the coupling. This request, however, is denied by Carroll. It is clear, therefore, that the deceased alighted from the train while still in motion approaching the van, that he went somewhere and found a coupling-pin, that he went between the car and the van, made the coupling, and immediately afterwards was seen crawling out, the wheels of one truck having passed over his legs. The learned Judge finds as a fact, notwithstanding Carroll's denial, that Carroll requested deceased to make the coupling. Carroll says he knew there was no coupling-pin on the van, that he alighted from the train as it approached the van, went to look for a pin, but could see no pin round. At that time the other brakesman was at the other end of the train, next the engine. Carroll says the van was in front of the station door, and he himself was half way between the station and the mainline switch, and Hudson says he, Carroll, was not near the place where the coupling was to be made. Now, unless the deceased had been asked to do this coupling, it is strange how he should have known there was no coupling-pin on the van, should have alighted from the train, have gone to search for and find a coupling-pin, and have made the coupling all of his own volition. No one can say precisely what occurred—whether the deceased stumbled after inserting the coupling-pin, whether he was thrown down by the still moving train, or whether the train had come to a stop at the moment of the coupling and was suddenly moved forward again by the engine. All that is known is that from some cause the deceased fell, and the wheels passed over his legs.

The deceased had been in his employment for about three years, more than two years before the date of the policy. The only other persons we hear of as employed about the station were the station-master and the telegraph operator; and whatever had to be done outside of the office had apparently to be done by the deceased. He was the baggage-man, the porter, the lamp-lighter, the sweeper, the cleaner, the switchman, the loader and unloader of freight, and the sealer of cars. In short he was a sort of factotum at the station, and, under those circumstances, one is quite prepared to learn that, when necessary, it was his habit, whether it was strictly his duty or not, to couple cars. The station-master says he has seen him do it. Henry Hatton, a carter and express man, who is nearly always about the station, says he has seen him coupling cars often, and he seemed a good coupler. The conductor already mentioned says he has seen him coupling cars, and often warned him to be careful when he was helping them when they were shunting. The telegraph operator, Robertson, has been employed at the station for eight years, and during that time has seen the baggage-men make couplings.

Now the evidence is that there was no definition of this man's duties about the station, no instructions which would convey to his mind that if a coupling was to be done he was not to do it. No doubt coupling is usually done by the brakesman, but if a coupling is required to be done and this man-of-all-work is at hand to do it, why should he not do it as well as another servant of the company. Is it the part of a faithful servant to say: "That is not my business?" One of the brakesmen was at the other end of the train, 17 or 20 cars away. Carroll does not say precisely how far away he was when he jumped off, but he was evidently a good way off, and in any case he had no coupling-pin. The deceased knew where to get a pin, and procured it and made the coupling. I think the fair conclusion under all these circumstances is that the deceased considered it his duty to his employers, as a faithful servant, to make the coupling, more particularly as he was requested to do so by Carroll. It was not an unnecessary act. It had to be done, and some one had to do it. Nor was it a voluntary act, if, as I think, he believed it was his duty to do it. Then as regards

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danger. I think the danger referred to in the policy must mean some visible apparent danger, which every prudent person would avoid unless compelled to incur it by some powerful motive which to his mind would make it seem necessary to do so. It is not shewn what, if any, danger was, or ought to have been, apparent to the deceased, nor that the act of coupling is itself necessarily dangerous. It is an act which is done thousands of times every day with safety, and had often been done with safety by the deceased. All that is required for safety is reasonable care. Many ordinary acts are attended with danger unless care is used, for example, descending a stair, handling a sharp knife or other tool, crossing a busy street, etc. The condition in *Neill v. Travellers Insurance Co.*, 7 A.R. 570 ; 12 S.C.R. 55, was expressed in terms identical with the present one. But the case was wholly different from the present, and was as plainly within the language of the condition as it could possibly be. The condition in *Cornish v. Accident Insurance Co.* 23 Q.B.D. 453, was somewhat different. The words were "exposure of the insured to obvious risk of injury." There the assured attempted to walk across a railway track in broad daylight and was killed by a passing train, which he either saw or, but for carelessness, might have seen approaching. The Court of Appeal decided that the case was properly held to be within the condition. But Lindley, L.J., delivering the judgment of the Court, shews that if the conditions were held to apply to all injuries caused by the negligence of the assured, such a construction of it would render the policy little better than a snare to the insured. Applying the reasoning in that case to the present, I am of opinion that this was not a case of voluntary exposure to unnecessary danger within the meaning of the condition.

In my judgment the appeal should be dismissed.

Moss, J.A. :—I agree that the appeal must be sustained. I base my conclusion on the ground that the defence of voluntary exposure to unnecessary danger has been established.

It is not necessary to enter into the vexed question of onus. The language of the present Chief Justice of Canada (then Mr. Justice Strong) in *Neill v. Travellers Insurance Co.*, 12 S.C.R.

55, at p. 63, appears to favour the view that an exposure to danger being shewn it is for the plaintiff to shew that the exposure was not voluntary or, if it was, that it was caused by some reasonable necessity. But assuming that the onus was upon the defence I think it has been discharged.

It is not disputed that when the deceased met his death he was in a place of danger. The act of coupling cars is always accompanied by more or less danger. In the case of a brakesman, whose duty requires him to couple cars, the exposure is to the necessary danger accompanying the act. But, in the case of a person not obliged to perform the duty, to undertake coupling is to voluntarily expose himself to unnecessary danger, unless there has arisen some sudden emergency creating a reasonable necessity for making the attempt, *e.g.*, saving of life, the prevention of serious disaster, or the like.

The circumstances of this case do not shew that the deceased had any such warrant or justification for his act. On the contrary, it appears that it was done voluntarily and without any reasonable necessity for it. It is said that Frederick Hudson, his companion on the afternoon of the accident, understood the brakesman Carroll, whose business it was to make the coupling, to ask the deceased to do it. Hudson did not give Carroll's language which led him to this understanding. On the other hand Carroll denied that he had asked the deceased to make the coupling. Carroll evidently did not understand the matter in the same way, for he expected to make the coupling himself and got off the train to get a coupling-pin for the purpose. He was not expecting deceased to do it for him. No one saw deceased provide himself with a coupling-pin, or do any act indicating an intention to make the coupling before he stepped between the cars. On the evidence it would be unsafe to conclude either that Carroll did ask him or that he understood Carroll to ask him to make the coupling, even if these things would make a difference. He had frequently on other occasions made a coupling without being asked or directed to do so. On the occasion of the accident he was seen to go between the cars when they were coming together, and all that appears is that by some means he got under the wheels and that after he was extricated the cars were found to be coupled. That the act was

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a dangerous one was proved by the result. That it was undertaken of his own will and that it was unnecessary for him to do it under the circumstances plainly appears.

The case, therefore, falls within the exception of "voluntary exposure to unnecessary danger," and there can be no recovery upon the policy.

Unfortunately for the plaintiff the deceased's case does not come within the 13th clause of the application and first proviso of the policy. It seems plain that the occupation or exposure there spoken of does not mean merely an isolated act or the temporary doing of something not in the line of the occupation held when the assurance is effected.

It means a permanent change to an occupation or exposure of a kind classed as more hazardous. From that time there is also a permanent change in the condition of the policy as regards the amount payable thereunder.

The act which caused the death, though not in the line of deceased's duty or of the work he was obliged to do as a station baggage-man or porter, was not in pursuance of a changed occupation, and but for the voluntary exposure clause would not have affected the claim under the policy.

*Appeal dismissed, the Court
being divided in opinion.*

R. S. C.

[DIVISIONAL COURT.]

HILL v. HILL.

D. C.

1901

Nov. 6.

Alimony—Lunatic—Admission to Asylum—Removal—Summary Judgment—Rule 616.

Held, affirming the decision of Meredith, C.J., 2 O.L.R. 289, that the plaintiff was not entitled to alimony.

Held, also, that, upon a motion by the plaintiff for summary judgment under Rule 616, where all the facts were before the Court, and the conclusion was against the plaintiff, it was proper to pronounce judgment dismissing the action, instead of merely dismissing the motion.

AN appeal by the plaintiff from the judgment of Meredith, C.J.C.P., 2 O.L.R. 289, upon a motion by the plaintiff for summary judgment under Rule 616, dismissing the action, which was for alimony, with costs. The facts are stated in the former report.

The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET and BRITTON, JJ., on the 6th November, 1901.

S. H. Bradford, for the plaintiff. The action should not have been dismissed, even if the plaintiff was not entitled to summary judgment upon the pleadings and examination of the defendant for discovery. The plaintiff has strong evidence to shew cruelty and neglect. The authorities of the asylum for the insane refused to take the plaintiff back, because the defendant had removed her twice. Once a separation there is no control in the husband: *Eversley on Domestic Relations*, 2nd ed., pp. 169, 255. [STREET, J.:—Surely, an insane wife separated from her husband by being placed in an asylum has no right of action for alimony. The husband is liable by statute to pay a reasonable amount for maintenance when the wife is in the asylum.] When this action was begun the wife was at large. As against her husband she has a right to say, "I will not allow myself to be maintained as a pauper at the public expense." She cannot be deprived of her marital rights unless by some act or crime which she is now incapable of committing. See *Pope on Lunacy*, 2nd ed., p. 271; *Bishop on Marriage, Divorce, and Separation*, ed. of 1891, vol. 1, sec.

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1265; Wood Renton on Lunacy, p. 30; *Hayward v. Hayward* (1858), 1 Sw. & Tr. 81. [STREET, J.:—The facts appear to be undisputed. She is simply a lunatic, and if it is his duty to support her, persons who furnish support may sue him, but alimony is entirely different.] There is separation by reason of insanity if cruelty shewn. [STREET, J.:—No.] Why should the wife be deprived of her rights because of the acts of her relatives? [STREET, J.:—This action is for alimony, not maintenance.] A motion under Rule 616* does not deprive the plaintiff of the right to go to trial if the motion is unsuccessful any more than a motion under Rule 603: *Cook v. Lemieux* (1885), 10 P.R. 577. The fact that the woman is a lunatic does not justify unfaithfulness or cruelty.

B. E. Swayzie, on the same side. The plaintiff is not a dangerous lunatic. She is entitled to conjugal rights. If the defendant refuses to receive her, she can maintain an action for alimony.

W. R. Riddell, K.C., for the defendant. *Hayward v. Hayward*, 1 Sw. & Tr. 81, 84, shews that a husband is entitled to place his lunatic wife in an asylum, and, if he does not, then he is to provide proper care and maintenance. As to the right to alimony, see sec. 34 of the Judicature Act, R.S.O. 1897 ch. 51. [STREET, J.:—The only question is, whether, if the wife is a lunatic, the husband is entitled to put her in an asylum.] *Hayward v. Hayward* settles that point; see also *Rex v. Mackenzie* (1766), 3 Burr. 1922; Schouler on Domestic Relations, 5th ed., sec. 45. A man may even be liable under the Criminal Code for the acts of an insane wife: sec. 213: and certainly he is morally bound to put her in proper custody. Alimony cannot be ordered unless the separation occurs through the fault of the husband. As to the proper practice, see Rules 615-617.

* 616—(1) A party may, at any stage of an action, apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, or in the examination of any other party, be entitled to; . . .

(2) The foregoing Rules shall not apply to such applications, and any such application may be made by motion as soon as the right of the party applying to the relief claimed has appeared from the pleadings.

(3) The Court or a Judge may, on any such application, give such relief, subject to such terms, if any, as such Court or Judge may think fit.

Bradford, in reply. Insanity does not deprive the wife of the right to her husband's faithfulness, and this should be tried. See *Wray v. Wray* (1858), 33 Ala. 187; *Parnell v. Parnell* (1814), 2 Hagg. Con. 269; Pope on Lunacy, 2nd ed., p. 275.

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On the same day the judgment of the Court was delivered by FALCONBRIDGE, C.J.:—For reasons stated in the discussion which took place between the Court and counsel on the argument, we are of the opinion that we ought not to disturb the judgment. The only question about which we have had any serious doubt is as to the dismissal of the action upon the plaintiff's motion for judgment under Rule 616. We think the learned Chief Justice had the right to dispose of the whole case on that motion, as all the facts were before him. Upon no conceivable ground is the plaintiff entitled to alimony. The appeal will be dismissed with costs.

Falconbridge,
C.J.

T. T. R.

[IN CHAMBERS.]

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FARMER V. ELLIS ET AL.

Nov. 1.

Summary Judgment—Promissory Note—Holder for Value—Fraud—Onus.

Where the maker and one of the indorsers of the promissory note sued on, in answer to a motion by the plaintiff for summary judgment under Rule 603, swore that they were induced to become parties to the note by fraudulent misrepresentations made by their co-defendants, particulars of which they set out, whereof they had reason to believe the plaintiff had notice :—

Held, having regard to sec. 30, sub-sec. 2, of the Bills of Exchange Act, that they were entitled to unconditional leave to defend, notwithstanding the plaintiff's affidavit that he was a holder for value.

Fuller v. Alexander (1882), 47 L.T.N.S. 443, followed.

THIS action was brought by the indorsee of a promissory note for \$1000 against the maker and several indorsers of it. The defendant Edith H. Ellis, the maker of the note, and the defendants V. R. Ellis and Edgar W. Smith, appeared to the writ of summons.

The plaintiff applied under Rule 603 to one of the local Judges at Hamilton for an order allowing him to enter summary judgment against these defendants, upon the ground that they had no defence. The defendants Edith H. Ellis and V. R. Ellis filed affidavits that they had been induced to give the note by the fraud of their co-defendants Edgar W. Smith and J. H. Jewell, setting out the particulars of the fraud, and that they had reason to believe that the plaintiff took the note with notice of the fraud. The defendant Smith denied being a party to the alleged fraud, and swore that he had no interest in the matter, but had indorsed the note for the accommodation of Jewell. The local Judge refused to grant the order.

The plaintiff appealed, and his appeal was heard by STREET, J. in Chambers, on the 1st November, 1901.

W. E. Middleton, for the appellant.

Arthur O'Heir, for the defendants Edith H. Ellis and V. R. Ellis.

J. W. Nesbitt, K.C., for the defendant Smith.

November 1. STREET, J.:—The defendants Edith H. Ellis and V. R. Ellis swear that they were induced to become parties

to the note sued on by certain fraudulent misrepresentations. The burden of proof that the plaintiff is a holder for value in good faith becomes shifted from the other parties to the holder when fraud affecting the note sued on is proved: see the Bills of Exchange Act, sec. 30, sub-sec. 2.*

In *Fuller v. Alexander* (1882), 47 L.T.N.S. 443, it is held that, under such circumstances, the defendants, having sworn to facts affecting the note with fraud, are entitled to unconditional leave to defend notwithstanding the plaintiff's affidavit that he is a holder for value. The English Rule of Court under which this decision was made is not, in substance, different from ours, and I think it should be followed.

I do not think that judgment should go against Smith any more than against the others upon this motion. He denies that he was guilty of any fraud in the matter; if the Ellises are liable, he will probably be liable also, but if it should be held that Jewell committed a fraud, and that the plaintiff took with notice of it, Smith should be allowed to shew, if he can, that he is not liable.

Appeal dismissed with costs to the respondents in any event.

T. T. R.

*30. Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value:

2. And every holder of a bill is *primâ facie* deemed to be a holder in due course; but if, in an action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof that he is such holder in due course shall be on him, unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course.

Street, J.

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[IN CHAMBERS.]

1900

MILLER V. SARNIA GAS AND ELECTRIC CO.

Oct. 12.

Parties—Third Party Procedure—Relief Over—Identity of Claims.

The owner and occupant of a house in a town sued a gas company for damages alleged to have been sustained by reason of an escape of gas from the defendants' pipes upon the highway into the plaintiff's premises. The defendants served a third party notice upon the town corporation, alleging that the break in the pipes was caused by the negligence of the corporation in the course of construction of a sewer in the same highway :—

Held, that there was no right to indemnify or relief over, within the meaning of Rule 209, as the damages which might be recovered by the plaintiff against the defendants were not the measure of the damages which might be recovered by the defendants against the third parties.

THIS action was brought by the owner and occupant of a house in Sarnia against the company for damages alleged to have been sustained by reason of the escape of gas from the defendants' pipes upon the highway into the plaintiff's premises. The defendants served a third party notice upon the corporation of the town of Sarnia, claiming to be indemnified against the plaintiff's claim, alleging that the break in the defendants' pipes from which the gas escaped to the plaintiff's premises was caused by the negligence of the third parties in constructing a sewer upon the street in question and a lateral drain connected therewith. The third parties appeared to the third party notice, and upon the motion for directions the usual third party order was made by the Master in Chambers allowing the third parties to defend the defendants against the plaintiff's claim, and directing the trial of the issues between the defendants and the third parties after the trial of the action as between the plaintiff and defendants. From this order the third parties appealed.

The appeal was heard by STREET, J., in Chambers, on the 12th October, 1900.

W. E. Middleton, for the third parties. The question whether there is a right of indemnity or relief over should be settled upon the motion for directions: *Baxter v. France*, [1895] 1 Q.B. 455, 591. Here there is neither a right to

indemnity nor to relief over, within the meaning of the Rules.* Indemnity means a right arising in the defendant against the third party in consequence of the defendant's liability to the plaintiff. If the defendant's right exists, apart from such liability, his claim is not indemnity: *Payne v. Coughell* (1895), 17 P.R. 39; *Wynne v. Tempest*, [1897] 1 Ch. 110. Relief over means relief over in respect of the claim of the plaintiff against the defendant, and is also dependent on the plaintiff's right against the defendant: *Windsor, etc., Ass'n. v. Highland Park Club* (1900), 19 P.R. 130; *Wilson v. Boulter* (1898), 18 P.R. 107; *Speller v. Bristol Steam Navigation Co.* (1884), 13 Q.B.D. 96. Here there is no right either of indemnity or relief over in respect of any recovery the plaintiff may have, as the fact of damages being recovered against a wrongdoer raises no implied right of contribution or indemnity against any other wrongdoer: *Merryweather v. Nixan* (1799), 8 T.R. 186; *Palmer v. Wick and Pulteneytown Steam Shipping Co.*, [1894] A.C. 318. Where the act complained of is not criminal or against public policy, there may be a promise to indemnify either express or by implication: *Dugdale v. Lovering* (1875), L.R. 10 C.P. 196; *Toplis v. Grane* (1839), 5 Bing. N.C. 636; *Betts v. Gibbins* (1834), 2 A. & E. 57; *The Englishman and The Australia*, [1895] P. 212. Upon this principle, until the statutory provision now found in the Municipal Act, R.S.O. 1897 ch. 223, sec. 609, it was settled law that no action could be maintained by a municipality against a person obstructing a highway for indemnity in respect to damages recovered against the municipality by reason of the obstruction: *Township of Vespra v. Cook* (1876), 26 C.P. 182. Here the third parties may be liable for some damages if they have broken the defendants' pipes, but any sum for which the defendants may be liable to the plaintiff can form no element in the recovery.

J. H. Moss, for the defendants. The case is manifestly one in which there is a common question for trial, and the policy of the Rules is, that such question should be determined in one proceeding. Even if there is not a claim for indemnity, there

* See Rules 209 *et seq.*, providing for the procedure where "a defendant claims to be entitled to contribution, or indemnity . . . or any other relief over."

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is a right to relief over. The English Rule is different, as it is confined to indemnity. I rely on *Christie v. City of Toronto* (1893), 15 P.R. 415.

H. D. Gamble, for the plaintiff.

STREET, J. (at the conclusion of the argument):—I think this appeal must be allowed. I agree with the contention made by the third parties that the third party procedure is only applicable where the defendant is, if liable to the plaintiff, entitled to recover against the third party the very damages which the plaintiff seeks to recover against him. Here there is no right to relief over on the part of the defendants, within the meaning of the Rules, as the damages which may be recovered by the plaintiff against the defendants are not the measure of the damages, if any, which may be recovered by the defendants against the third parties for the alleged tort of the third parties.

T. T. R.

[IN THE COURT OF APPEAL.]

LUDLAM V. WILSON.

Contract—Building Contract—Extras—Certificate of Superintendent.

C. A.

1901

Oct. 16.

A contract for the carpenter's work at the defendant's house provided that the contractor should be paid for work and extras, if any, on "certificate of superintendent of work." The contractor died after doing part of the work, and the plaintiffs thereupon agreed to deliver at the house "all the material referred to in the late (contractor's) contract, and all the conditions of that contract are to apply." The superintendent of work was a relation of and indebted in a large sum to the defendant, and the plaintiffs did not know this. Disputes having arisen, the superintendent of the work gave to the plaintiffs, under the defendant's instructions, a certificate that the plaintiffs had furnished all the material according to specifications, "except small matters which I will adjust under the terms of the contract." It was said by the defendant and the superintendent that this certificate had been given because they desired to get rid of the plaintiffs and to do the rest of the work themselves:—

Held, that as to extra material furnished by the plaintiffs, the condition as to the superintendent's certificate did not apply; and that, at all events, the certificate in fact given put an end to the contract and relieved the plaintiffs from doing anything further under it, so that the non-completion of the "small matters" in dispute formed no defence.

Held also, *per* ARMOUR, C.J.O., that the relationships, family and financial, of the superintendent to the defendant should have been disclosed to the plaintiffs, and that under the circumstances the plaintiffs were not bound to obtain a certificate at all.

Judgment of Falconbridge, C.J., reversed.

APPEAL by the plaintiffs from the judgment at the trial before Falconbridge, C.J.Q.B.

The action was brought for the price of materials supplied by the plaintiffs, under the following circumstances, for the carpenter work upon the defendant's house.

One William Craddock entered into a contract in writing with the defendant in the spring of 1897 to do the carpenter work and furnish the necessary material therefor upon a house then being erected for the defendant in the city of Chatham. The contract was in the following terms: "Memorandum of agreement between William Craddock and Matthew Wilson, whereby William Craddock agrees to furnish and do all the carpentry as required by or necessary for the completion of the plans and specifications, including furnishing material, work, and all cuttings whatsoever, of Wilson's proposed house on Wellington street, with the variations mentioned in the annexed variations to be made in woodwork, and to leave the same when done as one complete and finished job. Price to be (\$2000)

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two thousand—80% of value of work done and put in place to be paid on certificate of superintendent of work, and 20% on final certificate of superintendent on completion. No liens to be allowed to attach, and 20% to be held back to secure completion. Any extra additional carpentry work (which Wilson may require, if any) is to be furnished and done by William Craddock, who are (*sic*) to be paid extra therefor as may be agreed, and in default of agreement, as may be decided by the superintendent, and in the same way the superintendent is to decide and make the proper deductions from price if Wilson decides to omit or leave anything undone in plans and specifications and variations above referred to. None but first-class workmen to work at the job. If work not carried on or done to the satisfaction of superintendent, he may take and relet job and charge the contractor with loss.”

Then followed, or were annexed, a number of items headed “variations to be made in work.”

Under this contract Craddock proceeded with the work and furnished a certain quantity of materials until about the 25th of October, 1897, when he died. Tenders were thereupon called for by the defendant, or his superintendent, one Waugh, and, after some delay, the contract for the work and the material being severed, the plaintiffs tendered for the supply of the latter, and their tender was accepted on the 9th of December, 1897. Their tender and the defendant's acceptance thereof (both without date) were as follows:—“To Matthew Wilson. We hereby agree to furnish and deliver at your dwelling in course of erection at Chatham all the carpentry wood material (according to plans and specifications as referred to in late William Craddock's contract, with the variations attached to such contract, and undertaken by the late William Craddock) for the sum of \$1300, thirteen hundred dollars, to be paid as provided by that contract, and all the conditions of that contract are to apply to our contract with you; but from such materials we except the rectification of the floor as now laid in the attic, and except also the rectification of the window frames as now in; we merely furnishing enough material to finish the windows and floor without changing them or correcting the errors. You (Wilson) to have the right to take out the front

of the window frame now put in, and one piece of outside window finish, I replacing what you so take. Stuff to be delivered in what is known as 'knock down' state and to satisfaction of carpenter or superintendent.

We furnishing material (if required) to rectify stop on frames so as to make it suitable to receive screws. Ludlam & Fuller.

To Matthew Wilson. I recommend the acceptance of the above. Jas. S. Waugh.

To Messrs. Ludlam & Fuller. I accept the foregoing tender and agreement by you. Matthew Wilson."

Attached to the plaintiffs' tender was a letter dated the 7th of December, 1897, addressed to the defendant, in which they say:—"We will include in our tender given you the screens as per memo. shewn our Mr. Ludlam between yourself and Messrs. Piggott & Co., also construct dumb-waiter door of such size as you may direct, and arrange to hinge lower-half storm sash, without any additional charge on price quoted."

The memo. referred to was as follows:—"Memo. of agreement *re* screen windows and doors between Piggott & Co., contractors, and Matthew Wilson, owner. Piggott & Co. to put in house being built by Wilson the outside screens (doors and windows), including hardware and extra butts for storm doors on same hinges; put up finished first-class and painted three coats to correspond with building, etc., doors to imitate mahogany. Wire to equal Burrows' sample, with extra heavy wire for basement windows; and style, finish, numbering and fastenings to equal Burrows' best quality, and be of same kind, unless otherwise expressly accepted. Price \$42 per list attached, on certificate of completion by superintendent. Any additions or reductions are to add to or reduce price proportionately (if not agreed on) as superintendent may decide. Matthew Wilson."

This memo. appeared to have been prepared in contemplation of a tender by Piggott & Co. for the completion of the Craddock contract.

On the 9th of December, 1897, the defendant wrote to the plaintiffs: "I accept your tender and agreement in regard to

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the material, etc., for my house," and enclosing "your tender and acceptance and memo. of screens."

About the same time one William Selkirk tendered for the work and other furnishings on the house, and a formal contract of some kind was entered into between him and the defendant; and the defendant proposed that the plaintiffs should become sureties for the due performance of the work undertaken by him, but this they refused to do.

During the years 1898-1899 the work in the building was proceeded with slowly. Many small variations, additions and changes were required by the defendant or his superintendent, and a considerable quantity of additional material was furnished by the plaintiffs.

On the 8th of August, 1899, they rendered their account, claiming a balance of \$304.35 on the contract price, and \$300.97 for extras. On the 1st of September the defendant acknowledged receipt of the account in a letter to the plaintiffs, but claimed that it was so full of errors that it could not be discussed in a letter. He pointed out several matters of which he complained, such as defects in the bookcase (an extra), shrinkage in kitchen and verandah floors, screens and storm sashes improperly made or defective, covering for back door, etc. The plaintiffs contended that they had rectified them so far as they were bound to do so, and they supplied some small additional material, and continued to press for payment or settlement. On the 4th of December, 1899, the defendant sent to Waugh, as an answer to a request from Selkirk for a further certificate, a letter containing upwards of eighty objections to the work, nearly all of which related to Selkirk's work and not to the material furnished by the plaintiffs.

Further correspondence ensued between the plaintiffs and Waugh, the former insisting that they had done everything they were bound to do. Finally, on the 14th of February, 1900, the parties—plaintiffs, defendant and Waugh—came together, and the latter gave the plaintiffs the following certificate: "I certify that (Selkirk being satisfied) in my opinion Mr. Ludlam has furnished all the wood material under contract for Wilson's house, according to specifications, except small

matters which I will adjust under the terms of contract, and Mr. Ludlam need not furnish anything further."

It appeared that the certificate was prepared by the defendant and given by Waugh to the plaintiffs, with his assent, but it was asserted both by Waugh and the defendant that it was given "without prejudice," and because Waugh thought it would be better "to adjust the plaintiffs' account and get rid of them, and finish the work themselves, as it seemed almost impossible to get the plaintiffs to do it."

On the 26th of February the plaintiffs wrote to Waugh asking what adjustment he proposed making in regard to the "small matters" mentioned in his certificate. Waugh replied on the 2nd of March that he could "adjust the matters between plaintiffs and Wilson without delay," but requiring wood to be furnished for a porch at the rear of the house, etc., curtain poles and other matters. He also requested the plaintiffs to send in their accounts, return plans in their possession, etc. Nothing further was done, and the action was brought on the 10th of March, and at the trial judgment was given in the defendant's favour.

It was shewn at the trial that Waugh, the defendant's superintendent, was his uncle, and indebted to him in a large amount, and that the plaintiffs had no knowledge of these facts.

The appeal was argued before ARMOUR, C.J.O., OSLER, MOSS, and LISTER, JJ.A., on the 11th of January, 1901.

Aylesworth, Q.C., for the appellants.

J. G. Kerr, for the respondent.

October 16. ARMOUR, C.J.O.:—The relationship, family and financial, of the person nominated by the defendant as the person who, by the terms of the contract, was to decide as to the work to be done under it and as to its completion, and upon whose certificate the work was to be paid for, should have been communicated to the plaintiffs by the defendant before the contract was entered into, in order that in making the contract they might be on equal terms: *Kimberley v. Dick* (1871), L.R. 13 Eq. 1.

This relationship was of a private character, and the plaintiffs were strangers to the defendant and lived in a different place,

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and it could not be inferred that the plaintiffs were aware of it, and no proof was offered that either before the contract was entered into or during the progress of the work under it the plaintiffs were made aware of it.

I do not think that, under these circumstances, the plaintiffs can be barred by reason of their not having obtained the certificate of this person who, by his own evidence, shews that he did not stand indifferent between the parties, for he said that he would not have given the certificate without the consent of the defendant.

I am also inclined to think that what took place on the 14th of February, 1900, relieved the plaintiffs from the further performance of the contract, and consequently that they were relieved from the necessity of obtaining a certificate of the final completion by them of the work, the defendant and his superintendent both insisting at that time that the contract was not completed.

On that day the defendant drew up the following certificate which he gave to the superintendent, and which the latter copied and signed and gave to the plaintiffs:—"I certify that (Selkirk being satisfied) in my opinion Mr. Ludlam has furnished all the wood material under contract for Wilson's house according to the specifications, except small matters which I will adjust under the terms of the contract, and Mr. Ludlam need not furnish anything further."

What was meant by this, in my opinion, was that the plaintiffs were not to do anything further under the contract—and it is plain that they could not do anything further if they were to furnish nothing further—but were to leave the work just as it then was, and that the adjustment of the small matters not furnished was the fixing the price of them for which a deduction would be made.

That this is what was meant is evident from what the defendant said in his evidence, that the reason why this certificate was worded in the way it was, was "that we were going to get rid of Mr. Ludlam and get somebody else to finish the job." And the evidence of the superintendent is to the same effect.

I am, therefore, of the opinion that the appeal should be allowed with costs; that there should be a reference of all matters in difference in the action to the Master at Chatham; that the defendant should pay the costs of the action up to and including the hearing; and that further directions and costs should be reserved until after the Master shall have made his report.

OSLER, J.A. [after stating the facts as above set out]:—The defendant relies upon the absence of any final certificate by the superintendent of the completion of the work, and alleges that (within his alleged right under the contract) he has himself declined to accept it or to express his satisfaction with the house or with the material supplied by the plaintiffs. The latter by their pleading excuse themselves from producing the certificate of the superintendent on the ground that he was wholly under the control and influence and direction of the defendant, and was an improper person to act fairly and reasonably between the parties to the contract; that he acted under the advice of the defendant, and refused to give a certificate until the latter expressed himself satisfied with the material and work.

The learned trial Judge dismissed the action on the ground that a final certificate by the superintendent of the completion of the work was a condition precedent to the plaintiffs' right to recover, and that the honesty and competency of the former had not been successfully impeached.

It must be said that there was much in the business relations into which the parties entered which invited the trouble into which they have fallen. Their contract is very loosely framed; the work under it was evidently being constantly altered and interfered with, and the appointment as superintendent of one who was not only a relative of the defendant, but who was also drowned in his debt, was, to say the least of it, objectionable, whether the plaintiffs knew of it or not. In so far, however, as the contract makes it incumbent upon the plaintiffs to obtain a certificate, they cannot get on without one, unless they can prove something on the defendant's part which absolves them from compliance with that condition.

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The certificate of the 14th of February, 1901, though important in another aspect of the case and for a different purpose, cannot be regarded as a final certificate within the meaning of the contract, because it expressly assumes to leave open for adjustment by the superintendent the differences between the parties. How great these differences were, though they are spoken of in the certificate as "small matters," may be judged from the long list of the defendant's objections, and the fact that while the plaintiffs' claim is about \$600, the defendant seems to have thought that \$247 was more than he owed them.

The plaintiffs' claim is partly for the balance due on the contract price and partly for extras.

The first question is whether any certificate was necessary in respect of the latter, and this depends upon the proper construction of the contract.

Craddock's contract came to an end with his death. The plaintiffs did not assume it, and it is only important so far as any of its terms have been imported by reference into the plaintiffs' contract. The former was a contract to do all the carpentry work required upon the building, and also to supply all the necessary material therefor. The contractor was to leave it as one complete and finished job. When he died Selkirk contracted to do the work, and the plaintiffs contracted separately only to furnish and deliver at the house in the "knock down" state, *i.e.*, in the rough, "the carpentry wood material" according to the plans and specifications, with the variations attached to Craddock's contract, with certain specified exceptions. This was to be delivered to the satisfaction of the carpenter or superintendent. The plaintiffs did not contract, as Craddock did, to furnish and do additional carpentry work, and I think that term of Craddock's contract is not imported into theirs. The latter must be read according to its subject-matter, *i.e.*, as a contract to furnish specified material, and to do the comparatively trifling work mentioned in the amended tender; and, therefore, the stipulation that all the "conditions" of Craddock's contract are to apply to the plaintiffs' contract, cannot import into the latter an agreement to "furnish and do" any extra additional carpentry work required by the defendant.

For any material, therefore, or work done beyond that tendered and expressly contracted for, I think the plaintiffs are entitled to recover without a certificate.

Then, as to the balance of the contract price, the provision of the plaintiffs' contract as to payment is "the sum of thirteen hundred dollars to be paid as provided by (William Craddock's) contract." Turning to the latter, after describing the work to be done, and providing that it is to be left when done "as one complete and finished job," it proceeds, "price to be (\$2000) two thousand, 80% of value of work done and put in place to be paid on certificate of superintendent of work, and 20% on final certificate of superintendent on completion."

Now, what the plaintiffs were contracting for was not to make a complete and finished job of the house. They were to deliver material only, and to do the work specified in their letter of the 7th of December, and they performed this contract when they did so to the extent required thereby to the satisfaction of the carpenter or superintendent. Their contract is to be read with reference to what they had assumed to do, and so must the provision as to payment. They were, no doubt, required to obtain the superintendent's final certificate of completion, but that, I think, means the completion of their own contract, not of some one else's. As I have said, the certificate of the 14th of February is not the certificate required. It seems to me quite illusory and meaningless unless it was done, as the defendant and Waugh say it was, for the purpose of getting rid of the plaintiff and relieving him from doing anything further under his contract.

The question which remains, therefore, is whether the plaintiffs can, under the circumstances, recover the balance of the contract price without the certificate required by the contract.

The answer to this depends upon the effect of the certificate of the 14th of February, and the conduct of the defendant and his superintendent in giving it.

The defendant's right was to insist upon the certificate the contract called for—a certificate which the plaintiffs were not, I should say, at that date in a position to demand, and which

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the superintendent could not properly have given until the completion of the plaintiffs' contract to his satisfaction.

The evidence justifies the inference that the defendant discharged the plaintiffs from doing anything further under their contract. That is the meaning to be taken from the certificate, and the evidence of the defendant and his superintendent as to the reasons for giving the certificate of the 14th of February. It was a termination of the contract on the defendant's part and a waiver or dispensation of the necessity for any further certificate. The defendant could not discharge the plaintiffs from completing their contract and at the same time reserve or insist upon a right to have the superintendent deal with the plaintiffs' claim otherwise than as the contract provided. In other words, having thus discharged them, the plaintiffs could not be required to submit to have the small matters referred to in the certificate disposed of by the superintendent.

I think, therefore, that the contract certificate, as I may call it, was waived or dispensed with by the defendant, and that the plaintiffs are entitled to maintain the action without it. This, of course, would apply to the claim for extras as well as for the balance of the contract, had I been of the opinion that the extras were within the scope of the contract.

The appeal must therefore be allowed, and the action referred to the Master at Chatham as arranged between the parties at the trial, in order to ascertain what is due to the plaintiffs under both heads of their claim.

MOSS, and LISTER, JJ.A., concurred.

Appeal allowed.

R. S. C.

[IN THE COURT OF APPEAL.]

NORTH AMERICAN LIFE ASSURANCE COMPANY V. BROPHY.

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Insurance — Life insurance — Wager policy — Cancellation — Re-payment of Premiums.

Sept. 21.

The defendant, an elderly man, purchased from the plaintiff company an annuity upon his life, and, pursuant to a pre-existing arrangement between them, an insurance agent, who was a much younger man, insured his life with the plaintiff company for an amount the premiums upon which were equal to the amount of the annuity, and at once assigned the policy to the defendant who agreed to pay, and did for some years pay, the premium. The insurance agent got the benefit of the commissions on the annuity and the insurance and was not otherwise interested in the insurance:—

Held, that the insurance was void, as being in violation of 14 Geo. III, ch. 48, sec. 1, and that the plaintiffs, in an action brought after the death of the assured, were entitled to have the policy delivered up to the cancelled. Judgment of Street, J., affirmed.

Held, also, however, that though the defendant could not have maintained an action to recover the premiums, the plaintiffs seeking equitable relief were bound to do equity and to repay the premiums with interest, the risk never having attached.

Judgment of Street, J., reversed.

THE plaintiffs brought the action to have a policy of life insurance issued by them on the life of one Alexander Cromar, now deceased, for the sum of \$6,025, delivered up to be cancelled upon the ground that it was a wager policy within the meaning of 14 Geo. III, ch. 48, and, therefore, void under sec. 1 of that Act.

The defendant resisted upon the ground that the policy was issued to Cromar upon his own application and for his own benefit and that it was by him duly assigned to the defendant by an assignment executed on the 13th of March, 1897; and by way of counterclaim he sought to recover from the plaintiffs the amount of the insurance with interest and costs, and he also asked for such further and other relief as might be deemed necessary and proper.

The facts were as follows:

One Alexander Cromar, a broker and insurance expert, as he called himself, on the 27th October, 1885, wrote to the defendant Brophy as follows: "Re the pleasant intercourse we have had in business matters lately. On the condition of your making Mr. A. C. your referee, adviser and broker in any transaction relating to insurance, real estate or monetary invest-

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ments I agree and hereby promise to allow you the following rebate or commission off all premiums or amounts paid to any company or institution, transacting business in Canada, as follows, viz.: Annuity bonds, one-half of one per cent.; endowment policies, single premiums, one per cent.; endowment policies, annual premiums, ten per cent.; on all other transactions the half of commission given me as a general broker. Advice in any matter I will be pleased to give you to the best of my knowledge and ability gratis."

This proposed arrangement was apparently agreed to by the defendant Brophy and continued in force until after the impeached policy was effected.

The defendant Brophy deposed as follows: "I wanted to know from him the different kinds of insurance and we had a talk about it two or three times and he was telling me the different plans and they did not suit me altogether, and I was thinking over that thing one night and I wanted to have as little trouble with the business as possible myself, and I was thinking over it one night after we had talked the second or third day, and the next morning I told him what I had been thinking of during the night, that there seemed to be a convenient and easy way for me and that would be to buy the annuities and let the annuities go for insurance on my life, and he struck the table and said 'That is the best idea I ever heard; I have been a long time doing insurance business and that never came into my mind before,' so he went out of the room where we were and told the manager then what he proposed and that he approved of so much, and that is the first insurance he did for me." The insurance here referred to was an endowment policy in the New York Life Insurance Company upon the life of the defendant Brophy effected in 1885.

Shortly before the effecting of the impeached policy the defendant Brophy had an interview with Cromar, and this is the account he gave of it: "I said I had some more money to put into insurance and he said, 'Wouldn't it be much better for you to have a young life—how would it be if I put it on my life?' and he drew out the figures and shewed me the difference in the insurance that I would get on his life and on my life, and

shewed me the advantage of putting it on his life, and that is the way he came to put the insurance on his life.”

The defendant Brophy thereupon, through Cromar, applied to the plaintiffs for an annuity bond for \$300, and Cromar applied for an insurance on his life for an amount the annual premium for which would be met by the \$300 payable by the annuity bond, which amount was ascertained to be the sum of \$6,025.

The annuity bond was issued by the plaintiffs for the annual sum of \$300, payable to the defendant Brophy on the fifth day of March in each year, and the policy of insurance on the life of Cromar for \$6,025 in consideration of the annual premium of \$300 was issued by the plaintiffs payable to Cromar on the 5th day of March, 1917, if living, if not, to his executors, administrators, or assigns. This policy was originally written with premiums payable annually, 20th February, but was altered, making the premiums payable on the fifth day of March in each year, the same day on which the annuity of \$300 was payable.

The amount charged for the annuity was..	\$2,546.70
And for the premium of insurance	300.00
	<hr/>
	\$2,846.70

And from this was deducted one half of one per cent. on the sum paid for the annuity bond	\$12.73
And ten per cent. on the premium of insurance.....	\$30.00
	<hr/>
	42.73

Leaving a balance of \$2,803.97
these deductions being made in pursuance of the agreement contained in the letter of Cromar of the 27th October, 1885.

And for this balance of \$2,803.97 the defendant Brophy sent his cheque to the plaintiffs.

Thereafter, until the death of Cromar, who died on the 24th April, 1900, the money payable by the annuity bond was applied in payment of the premiums payable by the policy of insurance.

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On the 13th March, 1897, Cromar, by assignment under his hand and seal, assigned, transferred, and set over unto the defendant Brophy, and for his sole use and benefit, all his right, title and interest in and to the said policy of insurance, subject to all its terms and conditions, expressly reserving to the insured, however, sole right and power to make choice of any investment, option, or options granted under the conditions of said policy and personally to receive the full benefit thereof without the consent of any person or persons named therein as assignee or assignees, and that in the event of the death of the said assignee or assignees before the policy became due then and in that case the proceeds thereof should be payable when due to the insured, his executors, administrators or assigns.

The defendant Brophy said that this assignment was not according to his agreement with Cromar; that by it he was entitled to an absolute assignment, but that he submitted to taking it rather than have any trouble.

The action was tried before Street, J., who found that the arrangement between the defendant and Cromar was one by which the defendant having no interest in Cromar's life should be permitted to insure it for his (Brophy's) benefit and that the plaintiffs had no knowledge of such arrangement, and he held that the plaintiffs were entitled to the relief asked for, and that the defendant was not entitled to recover back the premiums paid, and he accordingly gave judgment for the plaintiffs with costs, and dismissed the defendant's counterclaim with costs.

The plaintiffs had not, by their statement of claim or otherwise, offered to return to the defendant the premiums which they had received from him on the policy in question.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 5th and 6th of June, 1901.

Daniel O'Connell, and *E. J. Butler*, for the appellant. The insurance was not void. It was effected by Cromar on his own life, and for his own benefit, and he assigned to the appellant, as he had a right to do, only a partial and contingent interest: *Vezina v. New York Life Insurance Co.* (1881), 6 S.C.R. 30;

North American Life Assurance Co. v. Craigen (1886), 13 S.C.R. 278; *Manufacturers' Life Insurance Co. v. Anctil* (1897), 28 S.C.R. 103. The tontine feature of the insurance is important; the transaction became in effect one for the division of profits after a certain period, rather than one of life insurance. At the least the appellant is entitled to repayment of the premiums: *Dowker v. Canada Life Assurance Co.* (1865), 24 U.C.R. 591; *Desborough v. Curlewis* (1838), 3 Y. & C. Exch. 175.

J. K. Kerr, K.C., and *J. A. Paterson*, for the respondents. It is beyond dispute that Cromar applied for the policy for Brophy's benefit, Brophy having no insurable interest. There has, therefore, been a violation of the statute and the policy is void: *Crawley on Life Insurance*, p. 26; *Evans v. Bignold* (1869), L.R. 4 Q.B. 622; *Shilling v. Accidental Death Insurance Co.* (1857), 2 H. & N. 42. The form of the assignment is of no importance; the terms of the agreement are proved and the contract at its inception was illegal and void. The defendant has not in his pleading claimed repayment of the premiums, and should not be allowed to make that claim now. At any rate he is not entitled to that relief: *Howard v. Refuge Friendly Society* (1886), 54 L.T.N.S. 644.

O'Connell, in reply.

September 21. ARMOUR, C.J.O.:—The evidence in respect of the impeached policy of insurance is very plain and simple. [The learned Chief Justice stated the facts as above set out and continued]:

The defendant Brophy had no insurable interest in the life of Cromar, and the policy of insurance effected as it was shewn by the above evidence it was, was clearly a wagering policy within the statute 14 Geo. III. ch. 48, and I do not think that the provisions of the assignment made it any less so, for the insurance was an entire contract, and being void in part was void altogether.

I have no doubt that so far as the defendant Brophy was concerned he acted in ignorance of the law and with no intention to do anything unlawful.

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If the plaintiffs were aware at the time of this transaction of its nature, and there is a good deal in the evidence tending to this conclusion, they would have no right to come to a Court seeking relief, for they would be *in pari delicto* with the defendant Brophy.

The learned trial Judge, however, found that they were not aware of it, and I am not prepared to dissent from his finding.

I at first thought that to entitle the plaintiffs to come to the Court seeking the relief they here seek they ought to have tendered or offered to return the premiums they had received with interest, but I find several cases in which such relief has been given without any such tender or offer.

The proper form of decree to be made herein will be that the policy be delivered up to be cancelled, that the premiums of insurance received by the plaintiffs be paid to the defendant Brophy with interest thereon from the date of their receipt, that the plaintiffs do have their costs of this action, that the counterclaim be dismissed with costs, and that this appeal be dismissed with costs, and that all the costs, when taxed, be set off against the premiums and interest payable by the plaintiffs to the defendant Brophy.

I refer to the following authorities in support of this decree: *Whittingham v. Thornburgh* (1690), 2 Vern. 206; S.C. Finch's Prec. 20; S.C. 2 Eq. Cas. Abr. 635; *De Costa v. Scandret* (1723), 2 Eq. Cas. Abr. 636; S.C. 2 P. Wms. 170; *Desborough v. Curlew*, 3 Y. & C. Exch. 175; *India and London Life Assurance Co. v. Dalby* (1850), 4 DeG. & Sm. 462; *Prince of Wales Association Co. v. Palmer* (1858), 25 Beav. 605; *British Equitable Insurance Co. v. Great Western R.W. Co.* (1869), 38 L.J. Ch. 132; and the decree made by Strong, V.C., in *National Life Assurance Co. v. Egan*, reported on motion for injunction (1873), 20 Gr. 469.

OSLER, J.A.:—The policy, though valid upon its face as a policy in favour of Cromar upon his own life for a sum payable to him on the 20th of February, 1917, should he then be living or to his executors in case of his death before that time, was an illegal, void and invalid instrument under sec. 1 of 14 Geo. III. ch. 48, because he was not at its incep-

tion the person really interested therein. The insurance was effected by and for the benefit of the defendant, who was to pay the first and subsequent premiums thereon under an agreement between Cromar and himself by which Cromar was to make the application and obtain the policy and then to assign it to the defendant. The defendant's own evidence appears to me to establish this beyond any question, and the case is thus distinguished from that of *North American Life Assurance Co. v. Craigen*, 13 S.C.R. 278, where the facts shewed that the application was really made by the person whose life was insured, though for the benefit of persons named in the application and policy, and to whom, on the death of the insured, the policy was to be payable. There the premiums were payable and were paid by the insured. The insurance was in its inception one really obtained by the applicant himself on his own life, though by the terms of the policy the money was directed to be paid to persons whom he intended to benefit. As is pointed out in the judgment of the present Chief Justice of the Supreme Court no rule of law or statute prevents insurance of that kind: "It is not one which the statute, 14 Geo. III. was designed to prevent. . . . Of course if it is made to appear by evidence that the undertaking of the person whose life is assured to pay the premiums is colourable, and that the premiums are in reality to be paid by a third person who has no insurable interest in the life and who is to have the benefit of the insurance, the policy will be a wager policy and so within the statute and void."

The evidence so plainly establishes all this in the present case that I think it unnecessary to say more than that I agree with the findings of the learned trial Judge thereon. The case of *Vezina v. New York Life Insurance Co.*, 6 S.C.R. 30, was much relied upon by the defendant. But that case turns altogether upon the facts which were held by the majority of the Court to prove that the insurance was valid in its inception as a *bond fide* insurance for his own benefit by the person whose life was insured without collusion between himself and the person who had paid the premiums and to whom he afterwards assigned the policy. See also *Evans v. Bignold*, L.R. 4 Q.B. 622.

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An important question bearing upon the proper disposition of the action remains to be considered. It is clear that where a policy is not void upon its face, and of which the illegality appears only by evidence *dehors* the instrument itself, the insurers are not bound to wait until an action has been brought by the insured, but may, just as in the case of a policy which has been obtained by fraud (*National Life Assurance Co. v. Egan*, 20 Gr. 469), themselves actively seek the intervention of the Court to relieve them from liability by cancelling the policy upon proper terms: *North American Life Assurance Co. v. Craigen*, 13 S.C.R. 278, 293; *Desborough v. Curlewis*, 3 Y. & C. Exch. 175.

The action, therefore, may well lie in the present case as the policy is not on its face open to the objection relied on. The plaintiffs, however, do not appear to have tendered repayment of the premiums received by them thereon before action, nor do they by their pleadings, as they did in the *Craigen* case, submit to such order being made in respect thereof as the Court may think proper. In the present state of the practice, I am not prepared to hold that a tender of the premiums before action was necessary. It is true that the defendant could not maintain an action to recover them, cognizant as he must be held to have been of the illegal nature of his agreement with Cromar and of the illegality of the policy obtained in pursuance thereof. When the policy is avoided for actual fraud on the part of the insured he cannot recover back the premiums: *Feise v. Parkinson* (1812), 4 Taunt. 640; *Anderson v. Thornton* (1853), 8 Exch. 425; *Howard v. Refuge Friendly Society*, 54 L.T.N.S. 644; and, except where the insured renounces the contract before the termination of the risk, the rule is the same when it is avoided for illegality, as for want of interest or otherwise, where the facts were known to him: *Lowry v. Bourdieu* (1780), 2 Dougl. 468; 1 Park on Insurance, p. 456; *Campbell v. Allan* (1808), 12 Fac. Coll. of Decisions 353; *Paterson v. Powell* (1832), 2 L.J.C.P. 13; *Douker v. Canada Life Assurance Co.*, 24 U.C.R. 591; *Pabyart v. Leckie* (1817), 6 M. & S. 290; *Oom v. Bruce* (1810), 12 East 225.

Fraud, or illegality, is an answer to an action by the insured "not from any merit in the defendants which justifies them in

retaining money which *ex aquo et bono* is not theirs, but from the demerit of the plaintiff which excludes him from the aid of a Court to draw it out of the defendants' hands." But where the insurers are unwilling to wait the result of an action upon the policy, and themselves seek the intervention of the Court to relieve them from it, a different principle applies. The money they received for premiums is not theirs as the risk never attached, and, therefore, in seeking equitable relief they must themselves do equity by returning the premiums or submitting to any order the Court may think proper to make. The distinction is well stated in *Schwartz v. United States Insurance Co.* (1812), 3 Wash. 170, 175. That was an action by the insured for a return of the premiums on a policy avoided for fraud. Washington, J., said: "The cases of *Whittingham v. Thornburgh*, 2 Vern. 206; *De Costa v. Scandret*, 2 P. Wms. 170, and *Wilson v. Duckett*, 3 Burr. 1361, in which the premium was decreed to be refunded, notwithstanding the fraud of the insured in obtaining the insurance, fall short of establishing the point for which the plaintiffs' counsel contend. In the two former, the insurers were plaintiffs in equity, seeking to set aside the policies on the ground of fraud; and since the insurers could not in conscience retain the premiums, no matter how great the demerit of the insured might be, a court of equity, governed by its own principles, could not relieve the insurers on other terms than compelling them to disgorge that to which they had no equitable right, and placing the parties in the situation they were in when the contract was entered into. The other case, though tried at law, was under a decree of the Court of Chancery, in which the insurers were complainants, and offered in the bill to repay the premium."

The same rule prevails in more modern cases.

In *Prince of Wales Association Co. v. Palmer*, 25 Beav. 605, the policy was avoided in equity at the instance of the company for the fraud of the person who had procured it. The premium was ordered to be applied so far as would be necessary in payment of the costs and the residue to be paid into Court with liberty to apply.

In *London Assurance v. Mansel* (1879), 11 Ch. D. 363, the company procured the contract for insurance to be rescinded

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on the ground of the fraudulent misrepresentations of the applicant. They had tendered back the premium and it was ordered to be repaid by them.

"Where equity relieves in ordering an instrument to be cancelled the general rule is, that the party in whose favour the decree is made shall do equity by returning the consideration": Bunyon on Life Assurance, 3rd ed., p. 120, citing *Barker v. Walters* (1844), 8 Beav. 92; *Anderson v. Fitzgerald* (1853), 4 H.L.C. 484.

The only hesitation I have had as to the jurisdiction of the Court to deal with the premiums in this case arises from the fact that the plaintiffs have not in their pleadings or at the trial expressly submitted themselves thereto. It was certainly usual under the former practice to make such a submission in the pleadings, either expressly or by the general prayer for further and other relief. And if this is really essential the only consequence would be that the plaintiffs' action must be dismissed with costs. Dealing with the point in *Barker v. Walters*, 8 Beav. 92, the Master of the Rolls said: "If it were necessary to make the offer, this, I own (*i.e.*, the prayer for general relief), seems to me to be sufficient." The report does not indicate that any such offer was made in *Prince of Wales Association Co. v. Palmer*, 25 Beav. 605. And an examination of the pleadings in the *Egan* case discloses that there was neither tender nor offer to return the premium, nor anything beyond the prayer for general relief. That case was tried before Strong, V.-C., and the decree ordered the policy to be cancelled and the premiums to be set off as far as might be necessary in payment of the plaintiffs' costs, the balance to be repaid to the defendant,

The plaintiffs, no doubt, have strenuously opposed any order to repay the premiums, but I think that having moved for the judgment of the Court in their action, they have made a sufficient submission of all their equitable obligations as to the premiums to enable the Court to make the proper order in respect thereof. They are not now in a position to ask for a dismissal of the action and, therefore, the judgment at the trial must be amended by directing a reference, if necessary, to ascertain the amount which has been paid to the plaintiffs on account of

premiums, and the payment of that amount to the defendant, or so much thereof as may remain after deducting the plaintiffs' costs of suit.

There should be no costs in respect of the appeal as to the judgment in the action, success being divided. The appeal as to the counterclaim should be dismissed with costs.

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LISTER, J.A.:—Upon the facts I concur in the conclusion arrived at by the learned trial Judge that the policy in question is, as being contrary to or in evasion of the provisions of 14 Geo. III. ch. 48, sec. 1, void. That section is in these words: "Whereas it had been found by experience that the making insurance on lives and other events wherein the assured shall have no interest hath introduced a mischievous kind of gambling, that from and after the passing of this Act no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event whatsoever, wherein the person or persons for whose use, benefits, or on whose account such policies shall be made, shall have no interest, or by way of gaming or wagering, and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever."

It has no application to an assurance *bonâ fide* effected by a person on his own life and who, without consideration, valuable or otherwise, by will or assignment directs payment of the sum assured to be made at his death to a third person; *Ashley v. Ashley* (1829), 3 Sim. 149; *North American Life Assurance Co. v. Craigen*, 13 S.C.R. 278.

But an assurance effected by one on his own life not for his own use and benefit, but really for the use and benefit of another who has no insurable interest in his life, and who pays the premiums and takes an assignment of the policy, is void. The law looks upon such a transaction as a mere evasion of the provisions of the statute: *Shilling v. Accidental Death Insurance Co.*, 27 L.J. Exch. 12; 2 H. & N. 42; *Vezina v. New York Life Insurance Co.*, 6 S.C.R. 30.

In this case the evidence of the defendant himself makes it plain that he had no insurable interest in the life of Cromar;

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that the assurance was effected by Cromar under an arrangement with the defendant by the terms of which it was to be effected not for Cromar's use or benefit but for the use and benefit of the defendant, who, under the arrangement, was to pay, and did pay, the premiums, and to whom the policy was to be assigned. Clearly, under these circumstances, the transaction from its inception to its completion by the assignment of the policy to the defendant, was illegal and void, as contravening the provisions of sec. 1 of the statute; in other words, it is a wager policy within the statute and, therefore, void, and so far as this action is concerned, it is, I think, immaterial that Cromar did not fully carry out his arrangement with the defendant by an absolute assignment of the policy.

As to the premiums the question arises, are the plaintiffs, in consequence of not having offered by their statement of claim either to repay the premiums paid or to submit to such terms as the Court might think fit to impose, entitled in this action to the relief which they seek? I think they are. Mr. Porter, in the 3rd edition of his work on the Law of Insurance, at p. 95, states both the rule and the reason for the rule in these words: "Equity, however, will only decree the delivery up of a fraudulent and, therefore, void policy when the insurer seeking relief offers either to repay the premiums paid or to submit to any terms which the Court may think proper to impose in granting such relief, which will include the repayment of premiums. To hold otherwise would be to let the insurer affirm and deny the contract in one breath."

While the earlier cases seem to support the rule as Mr. Porter states it, it has not been applied in the more modern cases. In *Prince of Wales Association Co. v. Palmer*, 25 Beav. 605, where the plaintiffs sought a cancellation of a life assurance policy on the ground of fraud, no such offer was made, and yet the Court decreed its cancellation and ordered that the premiums received by the plaintiffs should be applied in payment of the costs of the parties; and in the case in our Courts of *National Insurance Co. v. Egan*—unreported—which was also an action for the cancellation of a policy for fraud in which no offer was made by the bill to repay the premiums or to submit to such terms as the Court might think fit to impose in

granting the relief there sought, the present Chief Justice of the Supreme Court, then Vice-Chancellor, decreed the relief prayed for with costs to be paid out of the premiums, and the surplus, if any, to be paid to the defendant.

It would seem to follow from these cases that whatever the rule may have been it is not now necessary that an insurer, before he can successfully invoke the aid of the Court to relieve him from a policy which he alleges to be illegal, must by his statement of claim offer to repay the premiums paid or to submit to such terms as the Court may think fit to impose in granting relief. In such cases the Court will assume that the person seeking relief is willing to submit to any terms which it thinks fit to impose.

I think the judgment appealed from should be varied by ordering that the premiums paid by the defendant with interest thereon be applied in payment of the plaintiffs' costs and the residue, if any, paid to the defendant—see *British Equitable Insurance Co. v. Great Western R. W. Co.*, 38 L.J. Ch. 132—and that the judgment as varied should be affirmed with costs.

MACLENNAN, and MOSS, JJ.A., concurred.

Appeal allowed in part.

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Oct. 24.

Nov. 4.

REX V. KEEFER.

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Criminal Law—Trial—Election as to Mode of—Withdrawal.

Where a prisoner has been brought before a county court Judge and has elected to be tried without a jury, he cannot afterwards be allowed to withdraw his election and to re-elect.

IN the matter of two indictments pending in the county Judge's criminal court in and for the county of Wentworth a motion was made for a mandatory order directing the Judge of the county court of Wentworth to hear an application on behalf of the accused to allow them to withdraw their election for trial before him, without a jury, upon the said indictments, etc.

The facts were as follows: Each of the accused was charged before the police magistrate for the city of Hamilton on separate indictments with stealing four tubs of lard and two cheeses, and on the trial before the police magistrate both declined to elect and were committed for trial; subsequently they were both brought before the county court Judge under the Speedy Trials Act, and elected to be tried by him without a jury: afterwards on the day appointed for the trial, and when the trial was about to proceed, counsel for the accused made an application to the Judge for leave to withdraw the election for trial without a jury, and to be allowed to re-elect, which application the Judge refused to hear, and delivered the following judgment: "I refuse to hear an application to allow either Alexander Keefer or Arthur Clark to withdraw his election for trial without a jury, or to re-elect, as they have both already elected to be tried by me without a jury, after being properly addressed by me, as required by the Code, and my ground for refusal is, that I have no discretionary power to allow them to withdraw the election they have made, or to make a further election."

The motion for a mandatory order was heard by ROBERTSON, J., in Chambers, on the 22nd October, 1901.

J. V. Teetzel, K.C., for the accused, referred to Crankshaw's Criminal Code, 2nd ed., pp. 868 to 871, inclusive; *Regina v. Prevost* (1895), 4 Brit. Col. 326; *Regina v. Burke* (1893), 24 O.R. 64; *Regina v. Ballard* (1897), 28 O.R. 489.

J. R. Cartwright, K.C., for the Crown. The object of the Act was to allow speedy trials, and to save expense. The Legislature, after the decision of *Regina v. Ballard*, saw fit to extend the provisions so as to enable an accused, after electing to be tried by a jury, to withdraw that election, and to avail himself, notwithstanding his previous election, of the right to be tried by the county Judge without a jury, but it went no further. If the Legislature had intended to meet a case like the present, it must be presumed that it would then have so declared. Moreover the royal writ of mandamus will not be ordered unless there is a duty imposed upon the Judge to perform some legal act, which he has declined to perform. Here the learned Judge has no power to allow the accused to withdraw their election. The statute is silent as to a case like the present.

October 24. ROBERTSON, J.:—As I understand the facts, at the time of the application made to withdraw their election, the accused were still on bail, and had not surrendered or been surrendered to the custody of the sheriff; it being so stated by counsel before me, although they were before the Judge for trial. Here there never was an election to be tried by a jury, so that sub-sec. 5 of sec. 767 of the Code, which is the amendment made to the Code by the Criminal Code Amendment Act, 1900, does not apply; therefore the accused could not be proceeded against as if their first election had not been made; their application to the Judge, when brought up for trial, after the record had been made out, and the Crown ready to proceed with the trial, is not contemplated or provided for by the Act.

The Court was then constituted under sec. 772 for the trial of the accused; they had already been arraigned under sec. 767, and were then admitted to bail, and even had they been committed without bail, there is no provision then, after the sheriff

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has once acted, to compel him to bring them up before the Judge a second time, to enable them to change their election from trial by Judge to jury, but, had they at first elected to be tried by a jury, they might, notwithstanding such election, change their minds, and take advantage of the amending sub-sec. 5 of sec. 767, the spirit of the Act being to allow a speedy trial. It cannot be invoked, however, to delay the trial, after the accused have once elected to be tried speedily. The whole of the powers conferred upon the Judge as regards the arraignment of the accused and their trial, are statutory powers, and he has no discretion as to such an application as now made in these cases.

The Act does not contemplate that there should be a withdrawal of the election to be tried by the Judge without a jury, but full provision is made for re-election in case of an election to be tried by a jury (see sub-sec. 5 of sec. 767), and the reason is obvious. After such latter election, the accused may find that he will have to wait weeks, or perhaps months, before a trial by jury can be had, and rather than defer the trial until that event happens, the statute provides for his surrendering himself to the custody of the sheriff, should he be out on bail, or if already in custody, and to intimate to the sheriff, or notify him that he desires to re-elect, whereupon it then becomes the duty of the sheriff and Judge to proceed as directed by sec. 766, and thereafter (unless the Judge, or the prosecuting officer acting under sub-section 2 of that section, is of opinion that it would not be in the interests of justice that the prisoner should be allowed to make a second election) the prisoner shall be proceeded against as if his first election had not been made. The words "unless the Judge, or the prosecuting officer acting under sub-section 2 of that section, is of opinion that it would not be in the interests of justice that the prisoner should be allowed to make a second election," are to be read as in parenthesis.

So long as the statute does not provide expressly for the case presented here, I do not see how, by analogy or otherwise, it can be concluded that an accused can claim as a right to be allowed to withdraw an election duly made to be tried by the Judge, and to re-elect to be tried by a jury. The proceeding before the Judge when the sheriff brings the accused before him for election is matter of record. Section 764 declares that the

Judge sitting on any trial under this part of the Act, for all the purposes thereof and proceedings connected therewith or relating thereto, shall be a court of record, and the record in any such case shall be filed among the records of the court over which the Judge presides, as a part of such records. Then sec. 767 provides for the arraignment of the accused before the Judge, and by sub-sec. 3 of that section, it is provided that upon the accused consenting to be tried by him without a jury, the prosecuting officer shall prefer the charge against him, and upon being arraigned, he pleads. The record is drawn up in the form M M or N N, and the trial proceeds, and the finding of the Judge is entered on the record, etc.

Now, in my judgment, when the accused elected to be tried by the Judge without a jury, from that moment the Judge became seized of the case, and the trial had begun. A day was appointed later to have the witnesses *pro* and *con* brought before the Court. But the trial in fact was begun and proceedings taken in the Criminal Court so soon as the accused elected to be tried by that forum; he had no right after that to say "I have changed my mind;" if he could after the trial had begun, he could do so at any stage of it, before the Judge had pronounced upon the evidence. And, if that could be, the proceeding in the county Judge's criminal court would become a travesty on the administration of justice.

On the whole, after giving the statute and the several cases cited the best consideration of which I am capable, I think the motion must be refused with costs, and the trial must proceed before the county Judge's criminal court.

The defendants appealed from the order of ROBERTSON, J., and their appeal was heard by a Divisional Court composed of STREET and BRITTON, JJ., on the 4th November, 1901.

The same counsel appeared.

THE COURT gave judgment immediately after the argument, holding that the provisions of secs. 762 *et seq.* of the Criminal Code being explicit and not in any way authorizing or referring to an application to withdraw an election to be tried before a Judge, such an election having once been made cannot be

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withdrawn. It is a matter for legislative enactment as in the amendment to sec. 767 with regard to elections to be tried by a jury. The appeal should be dismissed without costs.

T. T. R.

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 Oct. 22.

WILSON V. BUTLER.

Will—Devise for Life and that of Wife, or Survivor—Special Occupant—Partial Intestacy.

A testator by his will devised lands to his son for his life, and in the event of his marriage, for the life of his wife or the survivor, and at his or their death, to his children, if any; but if he should die without issue, then over. The son married twice, having children by his first wife, but none by his second, who survived him:—

Held, that the widow was not entitled to a life estate by implication, and there being no special limitation to the heirs of the son, they could not take as special occupants during her life, and consequently the lands for the residue of her life went to the son's executors and were assets in their hands.

THIS was a motion by the plaintiffs for judgment upon the pleadings, and a cross-motion by the defendants for the construction of the will of Philip Butler, deceased.

The action was brought by the children of one Abner Butler to recover possession of a farm in the township of Windham. The defendant was the second wife of the said Abner Butler, who survived him. The plaintiffs were all children of his first wife.

The plaintiffs claimed title under the will of their grandfather, Philip Butler, who died in January, 1866. By the 3rd clause of his will he devised as follows:—"I give and devise unto my son Abner Butler the half of my homestead farm, being lot . . . together with all the buildings thereon erected for and during his natural life, and, in the event of his marriage, during the life of his wife or the survivor: and at his or their decease the said devised land to descend to his children if any, but if the said Abner Butler should die without issue the said land to descend to my then living children."

Abner Butler was unmarried at the time of the testator's death, but he afterwards married, and the plaintiffs were the children of the marriage; his wife died and he married a second time, but had no children by his second marriage. He died on February 19th, 1901, leaving his widow, the defendant, and his children, the plaintiffs, surviving him. The widow claimed to be entitled to a life estate by implication under the will of Philip Butler, and remained in possession of the land. It did not appear that any person had been appointed to be the personal representative of the estate of Abner Butler. The plaintiffs claimed possession.

The present motions were argued on September 25th, 1901, before STREET, J., in Weekly Court.

G. W. Wells, K.C., for the defendant, was first called on, and contended that there was a life estate by implication: *Hawkins on Wills*, 2nd Am. ed., pp. 6-7; *Jarman on Wills*, 5th ed., vol. 1, p. 451, and cases there referred to; that evidently some one was to hold till both husband and wife were dead, and this could be no one but the widow.

L. F. Heyd, K.C., for the plaintiffs, contended that there was no direct gift to the wife, and no estate by implication: *Theobald on Wills*, 5th ed., p. 250.

October 22. STREET, J. [after stating the facts as above]:—By the terms of the will of Philip Butler the land in question is limited to Abner Butler for his own life and the life of his wife, with remainder in fee to his children. The children are not entitled to possession as devisees under the will until the death of the survivor of Abner Butler and his wife, and she is still living. There is no devise to her under the will in express terms, and I can find no implication of any. The question to be determined is who is entitled to the possession of the land during the lifetime of the widow.

If the devise had been to Abner and his heirs during the lives of himself and his wife and the life of the survivor, then upon his death leaving his widow surviving, the heirs would have taken as special occupants during the life of the widow; but there being no special limitation to the heirs, the heirs

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cannot take as special occupants, and under the Statute of Frauds, sec. 12, as well as under the 3rd section of the Devolution of Estates Act, R.S.O. 1897, s. 3, the estate goes to the executors or administrators of the grantee and becomes assets in their hands: Challis on Real Property, 2nd ed., p. 325; Williams on Executors, 9th ed., p. 1538 *et seq.*

The title of the plaintiffs under the will of Philip Butler to the possession of the land does not accrue until the death of the widow, and the personal representatives of Abner Butler when appointed are the only persons who can evict her.

The plaintiffs' motion must be dismissed with costs.

In the absence of a personal representative, I cannot formally construe the will, and the cross-motion is therefore also dismissed without costs.

A. H. F. L.

MINNS ET UX. V. VILLAGE OF OMEMEE ET AL.

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Nov. 5.

Way—Non-repair—Opening in Street—Accident to Foot-passenger—Liability of Municipal Corporation—Nonfeasance—Limitation of Actions—Trap-door—Want of Guard—Master and Servant.

Two servants of one of the defendants were engaged in their master's business in unloading and storing a cask of beer in the cellar of his house by means of opening a trap-door in the sidewalk in front of the house. This was at night, and the trap-door being left open, and no light or guard being provided, the plaintiff fell into the opening and was injured :—

Held, that this negligence of the servants was attributable to the master, who was liable for the injury.

No act of negligence was proved against the other defendants, the village corporation, nor was there evidence upon which notice to the corporation might be attributed; the construction of an opening in the sidewalk is authorized by the Municipal Act, sec. 639, and no fault was alleged in its construction or maintenance; the corporation had no knowledge of the opening being left after dark without protection, and it was not shewn that they had means of guarding against it :—

Seemle, that, under these circumstances, the corporation were not liable.

Homewood v. City of Hamilton (1901), 1 O.L.R. 266, considered.

But, supposing the corporation liable, it could only be for nonfeasance, and not for misfeasance, and the action failed because not brought within the proper time.

THIS action was brought by Margaret Ellen Minns and her husband, David Minns, against the corporation of the village of Omemee and James Graham for the recovery of damages for injuries sustained by the plaintiff Margaret by reason of her falling into an opening in the sidewalk in George street, in the village, in front of the hotel of the defendant Graham.

The statement of claim alleged, *inter alia*, that the defendants the corporation had permitted the defendant Graham to maintain the opening for the purpose of an outside entrance into the cellar of the hotel; that on the 14th September, 1900, the defendants wrongfully and negligently opened and left open the hole in the sidewalk after dark, with no light and unguarded, and with a loose plank lying at the edge of the hole; that on that day, at about eight o'clock in the evening, the plaintiff Margaret, while lawfully walking upon the sidewalk along George street, by reason of the negligence and wrongful conduct of the defendants, stubbed her toe against the loose plank and fell forward into the hole, and was injured.

The defendants the corporation, by their statement of defence, set up that there was contributory negligence on the

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part of the plaintiff Margaret; that notice of the alleged accident and of the cause thereof was not given by the plaintiffs to the defendants, as required by sub-sec. 3 of sec. 606 of the Municipal Act; that the defendant Graham was not their servant or agent at the time of the accident, and if the plaintiffs suffered any damages they were caused solely by the negligence and misconduct of the defendant Graham, against whom they asked relief over.

The defendant Graham denied the allegations of the plaintiffs and set up contributory negligence.

The action was tried before BOYD, C., without a jury, at Lindsay, on the 23rd and 24th October, 1901. The facts sufficiently appear from the above statement and the judgment.

G. H. Watson, K.C., and *T. Stewart*, for the plaintiffs.

F. D. Moore, for the defendant corporation.

W. A. Stratton, K.C., for the defendant Graham.

November 5. BOYD, C.:—Upon the evidence I think it is a fair conclusion that the driver Lamb and the ostler Charlie were acting within the scope of their employment and for the benefit of their master, the defendant Graham. Both were engaged in their master's business in unloading and storing the cask of beer by means of opening the trap-doors in the sidewalk. Their negligence in so doing is attributable to the master, who is liable for the injury that happened to the female plaintiff: *Whatman v. Pearson* (1868), L.R. 3 C.P. 422; see also *Whitehead v. Reader*, [1901] 2 K.B. 28.

As against the defendant Graham there should be damages assessed for the wife plaintiff \$550, and for the husband plaintiff \$250, with costs of action.

I have doubt as to the liability of the corporation on the alleged ground of negligence. *Homewood v. City of Hamilton* (1901), 1 O.L.R. 266, was cited as covering the present case and conclusively establishing the liability of both defendants. The legal liability of the municipality is there taken for granted rather than discussed or decided. There was no act of negligence proved here or in that case so far as the municipality is concerned—no evidence that the opening had been used from

time to time in such a way as to be dangerous, whereby notice might be attributed to the corporation. As long as the trap-doors were kept closed the street was in good condition, and no possible danger existed.

The construction of the area or opening in the sidewalk was an act legalized by the Legislature: Municipal Act, sec. 639: * and no fault is alleged in its construction or maintenance. The whole trouble arose from the isolated act of the defendant's servants in taking in the barrel after dark without providing a light or guard on the street. This was not known to the municipality, and it is not shewn that they had means of guarding against it. But, assuming that I am concluded as to the liability of the corporation by the case cited, I think it can only be on the ground of omission, and not of commission. The blame resting on the village, at the highest, is non-repair, or omitting to set a light or guard at the opening—an act of nonfeasance, and not of misfeasance.

Thus regarded, the action is one which should be brought within three months after the damages have been sustained: secs. 606, 608: and this defence is pleaded. The point did not arise in the *Homewood* case. I have obtained the record of that case, and it appears the accident was on the 15th May, and the action was begun the next month, 16th June, 1900. In this case the writ is over eight months after the damages, and is too late.

Upon the general question of misfeasance and nonfeasance I may note the late case of *Lambert v. Corporation of Lowestoft*, [1901] 1 K.B. 590, in which dicta in *Municipal Council of Sydney v. Bourke*, [1895] A.C. 433, are explained.

As to the village the action is dismissed with such costs as would be taxable had the objection been raised as a question of law presented to the Court, before the trial, under Rule 373.

E. B. B.

* R.S.O. 1897 ch. 223, sec. 639.—(1) Municipal corporations may permit areas or openings to be constructed in or under the sidewalks and streets of their respective municipalities . . . and may make an annual charge for such privilege . . .

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COUNSELL V. LIVINGSTON ET AL.

Nov. 6.

Bills of Exchange—Notice of Dishonour—Sufficiency—Husband and Wife.

Notice was given to one of the indorsers of a promissory note on the day after maturity, as follows:—"I beg to advise you that . . . Mr. ———'s note for \$3,500 in your favour and indorsed by yourself and wife, and held by our estate, was due yesterday. As I have not received renewal, will you kindly see that same is forwarded with cheque for discount, as there is no surplus on hand:—"

Held, a sufficient notice of dishonour to the indorser to whom it was addressed, and also to his wife, as he was her agent.

ACTION by Charlotte F. Counsell, executrix of the will of C. M. Counsell, deceased, against Thomas C. Livingston, W. Churchill Livingston, and Charlotte E. Livingston, to recover \$3,500 and interest upon a promissory note made by the first-named defendant, and indorsed by the others. The facts are stated in the judgment.

The action was tried before FALCONBRIDGE, C.J.K.B., without a jury, at Hamilton, on the 17th October, 1901.

E. Martin, K.C., and *D'Arcy Martin*, for the plaintiff.

L. F. Heyd, K.C., for the defendant Thomas C. Livingston.

G. Lynch-Staunton, K.C., for the defendants W. C. Livingston and Charlotte Livingston.

November 6. FALCONBRIDGE, C.J.:—The promissory note sued on was made by the defendant Thomas C. Livingston, payable to the order of the defendant W. C. Livingston (son of the maker), and indorsed by W. C. Livingston and Charlotte Livingston, wife of the said W. C. Livingston.

It fell due on the 20th March, and was on that day presented by Mr. J. L. Counsell at the Bank of Montreal, the ledger-keeper replying, "No funds." In the course of the same day he (J. L. Counsell) saw the maker, who said he had not the renewal, but would get it. Next morning the maker came into J. L. Counsell's office, and said he had not the renewal yet. The note had been renewed many times, further renewals were in contemplation, and there were among the papers of the plaintiff's testator blank notes signed by Thomas C. Livingston

payable to the order of W. C. Livingston, but not indorsed by the latter.

I found at the trial that the defendant Thomas C. Livingston had no defence to the action, and I also found as a fact that J. L. Counsell on Tuesday the 21st March did sign, enclose, stamp, and mail in the general post-office at Hamilton the following letter :

“ Hamilton, Canada.

“ 21st March, 1901.

“ Dear Sir : I beg to advise you that Mr. T. C. Livingston's note for \$3,500 in your favour and indorsed by yourself and wife, and held by our estate, was due yesterday.

“ As I have not received renewal, will you kindly see that same is forwarded with cheque for discount, as there is no surplus on hand.

“ Yours truly,

“ J. L. COUNSELL.

“ W. C. Livingston, Esq.,

“ Brantford, Ont.”

The two questions now to be decided are : (1) Is the above a good notice of dishonour so as to hold W. C. Livingston ? And further (2), if so, is the notice to W. C. Livingston a good and sufficient notice to his wife, the defendant Charlotte Livingston ?

It was contended on behalf of the defendants W. C. Livingston and Charlotte Livingston that the letter in question was not a sufficient notice of dishonour, on the authority of *Solarte v. Palmer* (1834), 1 Bing. N.C. 194, and of *Furze v. Sharwood* (1841), 2 Q.B. 388. The first-named case was a judgment of the House of Lords (*temp.* Lord Brougham), and the opinion of the Judges was given by Park, J.

As early as 1853 regret was confessed by Lord Campbell, C.J., at this decision. He said, in *Everard v. Watson* (1853), 1 E. & B. 801, 804 : “ It has caused much confusion. It is, however, a decision which we cannot reverse ; indeed, I fear the House of Lords could not do so. But I do wish that it were reversed by Act of Parliament, so as to relieve the commercial world from the risk of misconceiving the law.” And he then proceeded to disregard the judgment on the ground that the words used in the case

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which he was considering were not the same as those used in *Solarte v. Palmer*. In *Paul v. Joel* (1858), 27 L.J.N.S. Ex. 380, Pollock, C.B., again regretted (p. 383) the case of *Solarte v. Palmer*. This "inconvenient decision" was eventually got rid of by considering it merely as a finding on the particular facts: see *Regina v. Bank of Montreal* (1886), 1 Ex. C.R. 154, at p. 171. It does not appear, as Judge Chalmers says in the 5th ed. of his Digest of the Law of Bills of Exchange, at p. 158, that since 1841 any written notice of dishonour has been held bad on the ground of insufficiency of form. See also Byles on Bills, 16th ed., pp. 227-9; Maclaren on Bills and Notes, 2nd ed., p. 263; *Bailey v. Porter* (1845), 14 M. & W. 44.

For these reasons, I think that the notice was sufficient.

A perusal of the examination of Mrs. Livingston satisfies me that her husband is her agent in this behalf, and that notice of dishonour has been given to him for her under the Bills of Exchange Act, sec. 49, sub-sec. (h).

The plaintiff is therefore entitled to judgment against all the defendants for the amount of the note and interest, with full costs of suit.

E. B. B.

[IN CHAMBERS.]

RE STURGEON FALLS ELECTRIC LIGHT AND POWER CO.
AND TOWN OF STURGEON FALLS.

1901
Nov. 15.

Arbitration and Award—Municipal Corporation—Purchase of Electric Light Plant—Appointment of Sole Arbitrator—Notice—Arbitration Act—Municipal Act.

By an agreement between the town corporation and the assignor of the company for the establishment and operation for ten years of an electric light plant in the town, it was provided that the town might at any time during the ten years purchase the plant at a valuation fixed by three arbitrators, appointed by each party choosing an arbitrator and they two a third in case of dispute, or by a majority of them.

Where a submission provides that the reference shall be to two arbitrators, the Arbitration Act, R.S.O. 1897 ch. 62, sec. 8 (b), gives power to the party who has appointed an arbitrator (if the other makes default as specified) to appoint that arbitrator as sole arbitrator; and it is provided that the Court or Judge may set aside any such appointment:—

Held, that notice of the appointment of the sole arbitrator should be given to the party in default, who, if not notified, is not called upon to move against the appointment.

Held, also, that the agreement was not to be read as suspending the choice of a third arbitrator till there should be a dispute, but it imported that the three arbitrators should act from the outset; and therefore sec. 8 (b) did not apply.

Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation (1901), 2 O.L.R. 301, and *Gumm v. Hallett* (1872), L.R. 14 Eq. 555, considered.

Seem, that the arbitration was under the Municipal Act, and sec. 8 of the Arbitration Act was not applicable at all: R.S.O. 1897 ch. 223, sec. 467.

An application by the company for an order directing the enforcement of an award purporting to be made upon an arbitration between the company and the town corporation, under the circumstances referred to, in the judgment.

The application was heard by BOYD, C., in Chambers, on the 8th November, 1901.

L. G. McCarthy, for the company, contended that under secs. 7 and 8 of the Arbitration Act, R.S.O. 1897 ch. 62, the award was binding on the town corporation, citing *Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation* (1901), 2 O.L.R. 301.

R. A. Grant, for the town corporation, opposed the application, and referred to *In re Smith and Town of Plympton* (1886), 12 O.R. 21, at p. 37; Russell on Awards, 8th ed., p. 49; *In re Smith and Nelson* (1890), 25 Q.B.D. 545; *Gumm v.*

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Hallett (1872), L.R. 14 Eq. 555; *Waterous Engine Works Co. v. Town of Palmerston* (1892), 21 S.C.R. 556; *In re Morell v. City of Toronto* (1872), 22 C.P. 326; *In re Croft and Township of Brooke* (1859), 17 U.C.R. 269; *In re Mottashed and County of Prince Edward* (1870), 30 U.C.R. 74.

November 15. BOYD, C.:—It was assumed on both sides during the argument that the 7th and 8th sections of the Arbitration Act, R.S.O. 1897 ch. 62, were applicable to this submission. The reference is based upon an agreement made in September, 1898, between the municipality of the town of Sturgeon Falls and one Ernest Albert Brenner, whereby Brenner is empowered to establish an electric light plant and appliances in the streets of the town and to operate the same for ten years. It is provided that disputes arising under the agreement as to the working of the power, etc., shall be referred to arbitration in the usual way by each party choosing an arbitrator and they two a third in case of dispute, and the award of a majority to be binding. The last clause of the agreement, and one now to be chiefly regarded, reads: "Provided also that the town may at any time during the ten years purchase the said electric light plant at a valuation fixed by three arbitrators appointed as before indicated, or by a majority of them."

On the 6th August, 1900, the town passed a resolution to purchase the plant and arbitrate as to the price: but meanwhile Brenner had assigned his rights and property in the plant to the Sturgeon Falls Electric Light and Power Company, limited.

Various interim proceedings and appointments took place which do not appear to be material: suffice it to say that on the 8th September, 1900, the municipality appointed Mr. Parker by by-law to be the town arbitrator, and on the 28th September Mr. McKee was appointed by the light company. Objection was made by Mr. McKee as not being a disinterested referee, and Mr. Parker declined to proceed on that account, and also because he was notified by the town solicitor that the council declined to proceed further with the arbitration, and notice to that effect was also served on the light company's solicitor. This recession appears to be the result of the changed policy of

the town, who now seek to proceed under the new sections of the Municipal Act empowering the construction of such works after fixing a price by by-law for the works of the existing light company: sec. 566, sub-sec. 4.

With this intent a by-law was passed by the town on the 15th November, 1900, fixing the price at \$3,436.16, of which no notice has been taken by the light company, and no action taken thereon.

On the 12th November the company served notice on the corporation that Dr. Bolster was appointed arbitrator on behalf of the company, and notified the corporation that after the expiry of seven days the said Dr. Bolster would proceed to make his award in the event of the arbitrator for the corporation refusing to proceed.

So matters stood till the beginning of 1901, when the same Mr. Parker was elected mayor of the town of Sturgeon Falls.

The next proceeding was service on the 31st January of a notice to the company in the following words: "You are hereby requested to appoint an arbitrator within ten days after service, in the place of John Parker, who has become incapable of acting by reason of his position as mayor, to determine and fix the amount to be paid under the agreement and submission," etc., etc.

Nothing being done or said by the corporation, it is stated in the affidavits that the company on the 15th February, 1901, duly appointed Dr. Bolster as sole arbitrator herein; but of this important act no notice was given to the corporation. On the 20th February Dr. Bolster gave notice to the corporation that he appointed the 25th February peremptorily to proceed in the reference . . . and in case of failure to attend by the corporation, without having shewn to his satisfaction good and sufficient cause for being absent, he would proceed with the reference *ex parte*. No notice was taken of this by the town, and the award was made by Dr. Bolster alone, no cause being shewn, on the 18th March, 1901, fixing the price of the plant at \$10,588.60.

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The Act R.S.O. 1897 ch. 62, sec. 8 (b),* gives power to the party who has appointed an arbitrator (if the other makes default as specified) to appoint that arbitrator to act as sole arbitrator. And it is provided that the Court or Judge may set aside any such appointment. That implies necessarily that notice of the fact of appointment as sole arbitrator should be given to the party in default, whereupon he may move to set it aside. No such notification was given here to the corporation—they did not know that Dr. Bolster had been appointed sole arbitrator, and till so notified they were not called upon to move against it.

When such serious consequences follow from the exercise of this power of appointing a sole arbitrator, the proceedings should be in strict form, if the award is to stand.

This point is sufficient to dispose adversely of the application to enforce this award.

But, if the Arbitration Act applies, I would hold, as at present advised, that the 8th section, under which action was taken by the light company, does not apply. The result is, that an award has been made by one arbitrator, which is in direct contravention of the submission, by which the award is to be by a majority of three arbitrators. The statute is not to be used so as to frustrate the intention of the parties as expressed in the reference. I do not read the last clause of the agreement as suspending the choice of third arbitrator till there is a dispute, but it imports, in conformity with the Municipal Act, that the three arbitrators should act from the outset: see R.S.O.

*8. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention:—

(b) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent.

Provided that the Court or a Judge may set aside any appointment made in pursuance of this section.

1897 ch. 223, sec. 450, sub-sec. 2,[†] and *Bates v. Cooke* (1829), 9 B. & C. 407.

Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation, 2 O.L.R. 301, was relied on as supporting the conduct of the light company, but that case is not so much in point as *Gumm v. Hallett*, L.R. 14 Eq. 555, not therein cited, which holds that the original of sec. 8 of the Arbitration Act does not apply to a reference to three arbitrators.

As I have said, it was assumed that the 8th section of the Arbitration Act governed the reference. But, if this proceeding is, as it seems to be, under the Municipal Act, this section is one which is not made applicable to such arbitrations: R.S.O. 1897 ch. 223, sec. 467.[‡] This, however, touches a larger question as to whether the appointment of an arbitrator was revocable by the town, and, as this was not discussed, I do not consider it.

The application to enforce the award is dismissed with costs.

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[†]450.- (2) The two arbitrators appointed by or for the parties shall within seven days from the appointment of the lastly appointed of them, appoint in writing, a third arbitrator.

[‡]467. Sections 9 to 12, 15, 17 to 27 and 40 to 44, and section 48 of the Arbitration Act shall apply to arbitrators appointed under the Act and to arbitrations thereunder.

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[IN CHAMBERS.]

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RE MAPLE LEAF DAIRY CO.

Nov. 15.

*Company—Winding-up—Application for Order—Previous Voluntary Assignment
—Creditors—Discretion.*

The Court has a discretion to grant or withhold a winding-up order under sec. 9 of R.S.C. 1886 ch. 129.

Re William Lamb Manufacturing Co. of Ottawa (1900), 32 O.R. 243, dissented from.

Where the assets of the company were small, and the creditors had almost unanimously entered upon a voluntary liquidation under the Ontario Assignments Act, a petition for a compulsory winding-up order was refused.

PETITION by a creditor for an order for the winding-up of the company under R.S.C. 1886 ch. 129. The facts are stated in the judgment.

The petition was heard in Chambers at Ottawa before BOYD, C., on the 2nd November, 1901.

H. A. Burbidge, for the petitioning creditor.

A. Haydon, for the company, the assignee, and other creditors.

November 15. BOYD, C.:—This is a comparatively small concern, incorporated 13th June, 1901, and making assignment for benefit of creditors on 15th October, 1901. Capital stock \$10,000 in 400 shares of \$25 each; of these 67 have been subscribed for, of which 29 were allotted as fully paid up in purchase of a private dairy business, the details of which are disclosed to the public by papers filed in the office of the Provincial Secretary.

On the remaining 36 shares taken there is a balance outstanding of \$316. They were subscribed to be paid for in cash, and it is on affidavit stated and not denied that there will be no difficulty in realizing payment of these unpaid balances of stock.

Leaving out a claim of \$3,000 odd of the Canadian Supply Company, for which they are willing to take in satisfaction a certain property of about equal value on which they have security, the liabilities are \$3,108 and the assets \$1,896.

Under the assignment the first meeting of creditors was held at Ottawa on the 28th October, at which a statement of affairs was fully given by the assignee. It was attended by almost all the creditors, who confirmed the appointment of the assignee, and appointed five inspectors of special competence.

The present petitioning creditor then filed his claim, and no objection to the proceedings was made by his solicitor.

The shareholders and the creditors as a whole, some 35, with the sole exception of the applicant, are content and desirous that the proceedings to liquidate should be continued and closed under the existing assignment.

Judgment was obtained on the same 28th October by the petitioning creditor for \$201, a sum just sufficient to give him a status under the Winding-up Act. Another judgment was obtained by another creditor, Osborne, on the 9th October, who accedes to the prosecution of the assignment, and was appointed one of the inspectors.

The petitioner takes his stand on *Re William Lamb Manufacturing Co. of Ottawa* (1900), 32 O.R. 243, and says his right to an order is *ex debito justitiae*. There are dicta in that case disagreeing with the prior decision of *Wakefield Rattan Co. v. Hamilton Whip Co.* (1893), 24 O.R. 107. I am unable to hold as indicated by Meredith, C.J., that the Court has no discretion in granting or withholding the order asked for under sec. 9 of the Winding-up Act.* The Court has to look not merely at the one creditor who applies, but at the body of creditors, who have the main interest in the assets, and ascertain, if it can, their attitude. In the case of a small affair like this, it would be most unfortunate if the costs were to be in part duplicated, and as to the balance increased by the more elaborate proceedings under the Dominion statute. I think the applicant, so far as dividend is concerned, will fare better under the method of realization now in operation than would result by means of compulsory liquidation.

In *In re Haycraft Gold Reduction, etc., Co.* (1900), 7 Mans. 243, at p. 249, Cozens-Hardy, J., says: "The existence of a

* 9. The Court may make the order applied for, may dismiss the petition with or without costs, may adjourn the hearing conditionally or unconditionally, or may make any interim or other order that it deems just.

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voluntary winding-up is a strong reason why the Court should decline to interfere" [by granting a compulsory order], "but circumstances may justify interference. The most common instance, no doubt, is where the Court holds that the resolution to wind up voluntarily has been passed fraudulently, but that is not exhaustive." No imputation of fraud or collusion is here made.

No doubt, a creditor is entitled, having brought himself within the conditions of the Act R.S.C. ch. 129, to have the company wound up by the Court as a general rule; but there are several exceptions to this, one of which arises where there would be no tangible advantage to the creditor in directing a compulsory liquidation; and another is where the creditors have almost unanimously entered upon a voluntary liquidation under the Ontario Assignments Act.

The distinction is succinctly made in *In re West Hartlepool Ironworks Co.* (1875), L.R. 10 Ch. 618, that, though the applying creditor may be entitled to a winding-up order *ex debito justitiae* as against the company, he is not so entitled as against the wishes and opposition of all the other creditors. This is the present case—the great body of creditors are content with and are proceeding under the voluntary assignment—this one creditor seeks to superinduce upon that the extra expense of proceedings under the Dominion statute. The estate is small and cannot stand much depletion for costs, and, in my opinion, the interests of the creditors are best served by letting the assets be administered as they propose. The observations of Mr. Justice Kay in *In re New York Exchange* (1888), 39 Ch.D. 415, at pp. 417, 419, are not without pertinence to this company: see *In re Greenwood & Co.* (1900), 7 Mans. 456.

I make no order in the present case, but refuse without costs, as *Re William Lamb Manufacturing Co. of Ottawa* justified the application. For like reasons I would give leave to appeal if security for costs is given by the applicant, who resides in Quebec.

It is a case in which the respondents should be allowed to add their costs to their claims.

E. B. B.

[DIVISIONAL COURT.]

REX V. DUERING.

D. C.

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Nov. 14.

*Justice of the Peace—Territorial Jurisdiction—Act for Protection of Sheep—
Offence against—Locality of—Owning Vicious Dogs—Order for Destruction
—Order for Damages—Information—Quashing Orders—Costs.*

Upon a motion to quash an order of a justice of the peace for the county of Waterloo, under secs. 11-13 of R.S.O. 1897 ch. 271, an Act for the Protection of Sheep and to impose a Tax on Dogs, finding that the defendant, at the town of Waterloo, did unlawfully have in his possession two dogs, which dogs worried and injured two sheep, the property of the complainant, at the township of Wellesley, and ordering the defendant to kill the dogs:—

Held, that the offence under sec. 11 was the having in possession a dog which, wherever the act was done, had worried, injured, or destroyed sheep, and therefore the offence was committed at the town of Waterloo, where the defendant lived, and a magistrate for the county had no jurisdiction, there being a police magistrate for the town, and it not appearing that the convicting magistrate was acting for or at the request of such police magistrate.

Upon the same information the same magistrate also made an order, under sec. 15 of the Act, for payment by the defendant to the complainant of \$10 (said to be the value of the sheep) and costs:—

Held, that a proceeding under sec. 15 is independant of one under secs. 11-13, and the magistrate had no power to award damages for the injury to the sheep without a separate complaint.

The first order was quashed without costs, because the question of the magistrate's jurisdiction was not raised before him, and the assuming jurisdiction was his mistake. The second order was quashed with costs to be paid by the complainant, because he insisted on going on with the claim for damages before the magistrate.

THE information or complaint of Abram Schott taken at the town of Berlin, in the county of Waterloo, on the 10th August, 1901, before J. A. Mackie, a justice of the peace for that county, charged that Henry B. Duering, of the town of Waterloo, in that county, within the space of one week last past, to wit, on the 4th August, 1901, at the township of Wellesley, in the same county, had in his possession two or more vicious dogs, and the said dogs did kill and destroy two sheep, the property of the deponent.

Upon this information, and evidence taken in the presence of the defendant before the above-named justice, the defendant was convicted, and, a writ of *certiorari* having been issued two convictions or orders were returned pursuant thereto.

One of these was as follows: "County of Waterloo. Be it remembered that Henry B. Duering having been on this day convicted before the undersigned, one of His Majesty's justices

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of the peace for the said county, on the oath of several creditable (*sic*) witnesses, for that the said Henry B. Duering, on the 4th day of August, 1901, at the town of Waterloo, in the said county of Waterloo aforesaid, did unlawfully have in his possession two dogs" (describing them) "which dogs worried and injured two sheep, the property of Abram Schott, at the township of Wellesley, in the county of Waterloo, on the said 4th day of August, 1901: I do, pursuant to the statute in that behalf, order that the said two dogs shall be killed by the said Henry B. Duering, within three days from his being served with a copy of this order." This order was dated the 26th August, 1901, at the town of Berlin, in the county of Waterloo, under the hand and seal of J. A. Mackie, J.P.

The other order was also under the hand and seal of J. A. Mackie, and bore the same date. It was as follows: "County of Waterloo. Be it remembered that on the 10th day of August, 1901, complaint was made before the undersigned . . . for that Henry B. Duering, of the town of Waterloo, in the county of Waterloo, owned or had in his possession two dogs and now owns or has in his possession such dogs, which within six months prior to the said date, to wit, on the 4th day of August, 1901, at the township of Wellesley, in the said county of Waterloo, worried, injured, killed, and destroyed two sheep, the property of Abram Schott, of the said township of Wellesley, and now at this day, to wit, on the 26th day of August, 1901, at the town of Berlin, in the said county of Waterloo, the said Henry B. Duering appeared before me . . .; and now, having heard the matter of the said complaint, I do adjudge the said Henry B. Duering to pay to the said Abram Schott the sum of \$10 on or before the 3rd day of September next, and also to pay to the said Abram Schott the sum of \$16.75 for his costs in this behalf; and if the said several sums be not paid on or before the said 3rd day of September, 1901, then I hereby order that the same be levied by distress and sale of the goods and chattels of the said Henry B. Duering."

On the 7th October, 1901, *D. L. McCarthy*, for the defendants, obtained from MEREDITH, C.J.C.P., and LOUNT, J.,

sitting as a Divisional Court, a rule *nisi* to quash the two convictions or orders upon the following grounds:—(1) That the convictions or orders are invalid in that convictions or orders for distinct matters of complaint and involving separate and distinct consequences to the defendant are made upon one information or complaint and upon one hearing. (2) That the adjudication of the justice before whom the hearing took place was altered after the first conviction or order had been made, and different adjudications sought to be substituted therefor, without any notice to the defendant. (3) That no evidence was given on the said hearing of the amount of the damage caused to the complainant by the alleged killing of the sheep in question, nor do the orders made by the said justice for payment of a sum of money by the defendant to the complainant allege that such sum was the amount of such damage or was to be paid in compensation for such damage or that any damage was in fact sustained, and such orders are, therefore, invalid. (4) That the adjournment of the hearing by the justice for the convenience of the complainant on the 20th August, without fixing a day for resuming the hearing, rendered all further proceedings nugatory. (5) That the orders made by the justice for the killing of the dogs in question are invalid as shewing on their face that the alleged offence upon which the orders are based was committed in the town of Waterloo, and that the said orders were made by the said justice sitting at the town of Berlin, which towns are not within the jurisdiction of the said justice, there being a police magistrate for the said towns. (6) That the said justice had no jurisdiction to order payment by the defendant to the complainant of certain items included in the costs directed to be paid.

Affidavits were filed in support of and against the rule as to some of the grounds taken therein.

The following sections of R.S.O. 1897 ch. 271, an Act for the Protection of Sheep and to impose a Tax on Dogs, may be referred to:—

11. On complaint made in writing on oath before a justice of the peace for any city, town or county, that any person residing in such city, town or county, owns or has in his

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possession a dog which has within six months previous worried or injured or destroyed any sheep or lamb, the justice of the peace may issue his summons, directed to such person, stating shortly the matter of the complaint, and requiring such person to appear before him, at a certain time and place therein stated, to answer to such complaint, and to be further dealt with according to law.

12. The proceedings on the complaint and summons shall be regulated by the Ontario Summary Convictions Act, which shall apply to cases under this Act.

13. In case any person is convicted, on the oath of a credible witness, of owning or having in his possession a dog which has worried or injured or destroyed any sheep or lamb, the justice of the peace may make an order for the killing of such dog (describing the same according to the tenor of the description given in the complaint and in the evidence) within three days, and in default thereof may in his discretion impose a fine upon such person, not exceeding \$20 with costs; and all penalties imposed under this section shall be applied to the use of the municipality in which the defendant resides.

14. No conviction under this Act shall be a bar to any action by the owner or possessor, as aforesaid, of any sheep or lamb for the recovery of damages for the injury done to such sheep or lamb, in respect of which such conviction is had.

15.—(1) The owner of any sheep or lamb killed or injured by any dog shall be entitled to recover the damage occasioned thereby from the owner or keeper of such dog, by an action for damages or by summary proceedings before a justice of the peace, on information or complaint before such justice, who is hereby authorized to hear and determine such complaint, and proceed thereon in the manner provided by the Ontario Summary Convictions Act in respect to proceedings therein mentioned; and such aggrieved party shall be entitled so to recover in such action or proceedings, whether the owner or keeper of such dog knew or did not know that it was vicious or accustomed to worry sheep.

(6) Appeals against any conviction, apportionment or order made by a justice of the peace under this section, shall be made to the Division Court . . .

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On the 14th November, 1901, before a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and LOUNT, JJ., *J. C. Haight*, for the defendant, supported the rule. The information appears to be under sec. 15. There cannot be an adjudication for two offences upon one information: sec. 845, sub-sec. 3, of the Criminal Code. It is not suggested anywhere that these dogs ever killed or worried sheep before. The allegation of owning and killing on the same day does not shew the possession after the killing: *Hamilton v. Walker* (1892), 61 L.J.N.S.M.C. 134. The magistrate had no jurisdiction over an offence committed in the town of Waterloo, a police magistrate having been appointed for the towns of Berlin and Waterloo: see *The Ontario Gazette*, 14th October, 1899. By R.S.O. 1897 ch. 87, sec. 7, the jurisdiction of a justice of the peace is excluded where there is a police magistrate, except in the cases of illness, absence, or request, none of which is shewn here. See also the Interpretation Act, R.S.O. 1897 ch. 1, sec. 8, sub-sec. 22. The magistrate sat at Berlin; he could not adjudicate there upon an offence committed in Waterloo, even if he had jurisdiction in himself: *Regina v. Roe* (1888), 16 O.R. 1. There was no evidence of damages sustained by the complainant. The offence under secs. 11 to 13 and the offence under sec. 15 are quite distinct; the enactments were originally contained in different statutes.

William Davidson, for the complainant. The information charges the offence of owning as committed in the township of Wellesley. The damages under sec. 15 follow upon the conviction under sec. 13.

MEREDITH, C.J. (at the close of the argument):—We think that the objection taken by Mr. Haight that the magistrate who assumed to try these complaints had no jurisdiction to do so is well taken. There was a police magistrate for the town of Waterloo, and that being so, the jurisdiction of the ordinary county magistrate to adjudicate as to an offence

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committed within the town was taken away, unless a case had been made, which does not appear from these proceedings, that the magistrate was acting for or at the request of the police magistrate, or in circumstances in which it is provided that a justice may act.

Here it appears upon the face of the proceedings, I think, that the offence which was charged, which is the having in possession a dog which has within six months done the act which the 11th section mentions, was committed at the town of Waterloo, where the defendant resided, as is shewn by the conviction.

The mistake of the magistrate, no doubt, arose from his erroneously assuming that the offence was committed at the place where the sheep had been worried, injured, or destroyed, which is stated to have been in the township of Wellesley; but that is not the offence, as I have already said. The offence is the having in possession a dog which, wherever the act has been done, has worried, injured, or destroyed sheep within the six months. So that it is clear, I think, that the magistrate had no jurisdiction to entertain the complaint under sec. 11 of the Act.

With regard to the other matter, the order purporting to be made under sec. 15, I think it is clear that that is not a proceeding ancillary to the trial and determination of the complaint under sec. 11. Under sec. 11, the inquiry is complete when the magistrate has adjudicated as to whether or not the person complained of has done the act mentioned in sec. 11, and has, if he convicts, imposed the penalty which he is authorized by sec. 13 to impose, that is to say, made the order for the killing of the dog within three days, and in default,—whatever that may mean,—imposed the fine not exceeding \$20 and costs, if he decides to impose it.

The proceeding under sec. 15 is, by the very terms of the section, one to be taken upon an information or complaint to the justice for the recovery of damages for which the owner of a dog which has killed or injured sheep is liable to the owner of the sheep.

When one considers where that section came from and the purpose of the law, it is manifest, I think, that Mr. Davidson's

contention cannot prevail. At common law it was necessary to prove scienter, and the only remedy was by an action in the ordinary course. The purpose of this section was to do away with the necessity of proving scienter, and to enable the person injured, at his election, to proceed either by action or by summary proceeding before a justice. It formed part, as Mr. Haight has pointed out, of an entirely different statute, and the mere fact that the two provisions are brought together in this way, although it might at first sight lead one to suppose that one was a sequence of the other, really does not properly lead to that conclusion.

The inquiry under sec. 11 was completed, and there was no power under that section and in a proceeding under it to enter upon the inquiry as to damages which had been committed.

There is the further objection that the complaint when laid was not under this section, but was properly made under sec. 11, and the person making it did not ask the magistrate to enter upon the inquiry as to the damages under sec. 15.

I do not know how far the objection which we have determined against the respondent upon the question of jurisdiction is applicable under sec. 15. Possibly, different considerations might have applied if proceedings had been taken under sec. 15, for the act for which the liability arises is the killing or injuring of the sheep, and that took place in the township of Wellesley.

The result is, that we must come to the conclusion that neither the order nor the conviction can stand, and that both must be quashed.

With regard to the costs, we think that as to the motion to quash the conviction which was followed by the order for the destruction of the dog, there should be no costs. The evidence disclosed that an offence had been committed under sec. 11, and the question of the want of jurisdiction was not raised, and the assuming jurisdiction was the mistake of the magistrate. We think that we may fairly, in these circumstances, exercise our discretion as to costs by not imposing the costs upon the respondent, although he has failed. These considerations do not apply to the other appeal, because he insisted upon going on with the claim for damages which we have held the

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magistrate had no jurisdiction to entertain,—not merely a want of jurisdiction by reason of the locality, but for the other reasons already mentioned—and the costs incident to the quashing of that conviction or order the respondent must, therefore, pay.

MACMAHON and LOUNT, JJ., concurred.

E. B. B.

[IN THE COURT OF APPEAL.]

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McHUGH V. GRAND TRUNK RAILWAY COMPANY.

Executors and Administrators—Fatal Accidents Act—Death of Beneficiary—Survival of Action.

Upon the death before judgment of the sole beneficiary on whose behalf an administrator has brought an action under the Fatal Accidents Act, R.S.O. 1897 ch. 166, the action comes to an end. It cannot be continued for the benefit of the beneficiary's estate, nor can a new action be brought by the beneficiary's personal representative.
 Judgment of Ferguson, J., 32 O.R. 234, reversed.

AN appeal by the defendants from the judgment of Ferguson, J., reported 32 O.R. 234, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, and LISTER, JJ.A., on the 9th of April, 1901. The question was whether, upon the death of a beneficiary on whose behalf an action is brought, under the Fatal Accidents Act, by an administrator, the action could be revived or a new action brought by the personal representative of the deceased beneficiary. The line of argument is indicated in the report below and in the judgments.

W. M. Douglas, K.C., for the appellants.

Mabee, K.C., and W. E. Middleton, for the respondent.

November 15. ARMOUR, C.J.O.:—Patrick J. McHugh died on the 1st of March, 1900, from injuries received while in the employment of the defendant company, and the only person for whose benefit an action could be brought for such death was his mother, Mary McHugh.

This action was commenced by the plaintiff, as administrator of the deceased, on the 25th of March, 1900, and on the same day on which issue was joined in the action, the 25th of May, 1900, the said Mary McHugh died.

On the 16th of July, 1900, an order of revivor was issued permitting this action to be continued by the plaintiff as administrator of the estate of Mary McHugh as well as administrator of Patrick J. McHugh.

And the question, the determination of which is sought, is whether any cause of action survived to the plaintiff as administrator of the estate of Mary McHugh or as administrator of the estate of Patrick J. McHugh?

This question, as it appears to me, would have been more properly raised by a motion to stay the proceedings in this action by reason of the death of Mary McHugh, the sole person for whose benefit the action was maintainable.

And the question whether this action could be proceeded with by the plaintiff as administrator of Patrick J. McHugh after the death of Mary McHugh, seems to me to be the essential question to be determined, and must be determined by the proper construction to be placed upon the Act commonly known as Lord Campbell's Act, R.S.O. 1897, ch. 166.

"Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim *Actio personalis moritur cum personâ*, because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. And not only so, but the action is not an action which he could have brought if he had survived the accident, for that would have been an action for such injury as he had sustained during his lifetime, but death is essentially the cause of the action—an action which he never could have brought under circumstances which, if he had been living, would have given him for any injury short of death which he might have sustained, a right of action, which might have been barred either by contributory negligence, or by his own fault, or by

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his own release, or in various other ways:" *per* Lord Selborne in *Seward v. Vera Cruz* (1884), 10 App. Cas. 59, at p. 67.

"Before Lord Campbell's Act, where a person had been injured from any of the causes mentioned in the first section of that Act and had died, the maxim *Actio personalis moritur cum personâ* applied; he could not sue, for he was dead, and it did not survive to anybody whomsoever to sue for the damages occasioned by the accident which had caused injury to him resulting in death. That Lord Campbell, or rather the Legislature at the instance of Lord Campbell, thought fit to alter, and I think that when that Act is looked at it is plain enough that if a person dies under the circumstances mentioned, when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as is pointed out in *Pym v. Great Northern R.W. Co.* (1862), 2 B. & S. 759; (1863), 4 B. & S. 396, is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who under such circumstances suffers pecuniary loss by the death:" *per* Lord Blackburn in *Seward v. Vera Cruz*, 10 App. Cas. 59, at p. 70.

The action being a totally new one, the creation of the statute, the procedure prescribed by the statute must be strictly followed, and it is only those named in the statute as persons entitled to bring the action who can bring it.

And the action in this case having been brought by the administrator of the deceased Patrick J. McHugh, he, as such administrator, was the only person entitled to maintain it.

And he could maintain it only for the benefit of Mary McHugh, the mother of the deceased, and as a trustee for her and not for the benefit of the estate of the deceased, and any money recovered in the action could never become assets of the deceased's estate.

What, then, was the effect of the death of Mary McHugh upon the action? Was the right to maintain it at an end? It could no longer be maintained for the benefit of Mary McHugh, but only for the benefit of her estate, and in such case not for

the benefit of persons for whose benefit alone the action was created.

If the administrator of Patrick J. McHugh had not brought this action, but Mary McHugh had herself brought it, what effect would her death, as and when it took place, have had upon the action? Would it not plainly have put an end to the action, for in that case there would have been no one to bring the action who was entitled by the statute to bring it.

And why is not the effect the same upon the action brought for her benefit by the administrator of the deceased, when she, for whose benefit alone the action is brought, has ceased to exist.

It appears to me that the statute provides only for the personal benefit of the persons named therein and not for the benefit of their estates, and that to hold otherwise would be an unwarrantable extension of the provisions of the statute.

I do not think that sec. 10 of R.S.O. 1897, ch. 129, applies to a cause of action arising under Lord Campbell's Act, for the words therein used, "for all torts or injuries to the person," are capable of reasonable and sensible application without extending them to include the death of the person.

"Now, if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so:" *per* Lord Selborne in *Seward v. Vera Cruz*, 10 App. Cas. 59, at p. 68.

Cases from the United States are no help to us in construing Lord Campbell's Act, for they all proceed upon the construction of Acts essentially different from it.

In my opinion the appeal should be allowed, and the questions answered in the negative.

OSLER, J.A.:—Patrick J. McHugh, a brakesman in the employment of the defendants, was accidentally killed in consequence, as it is said, of some negligent act or default on their part. The plaintiff took out letters of administration to

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his estate for the purpose of bringing this action under the provisions of the Fatal Accidents Act for the benefit of his mother, who was the only surviving relative of the deceased entitled to take advantage of the Act. She died immediately after issue was joined and before the action could be brought to trial, having survived her son a little less than three months. The plaintiff then took out letters of administration to her estate also, and revived and seeks to continue the action as administrator of both the decedents.

The question is whether any cause of action survives or accrues to the plaintiff as administrator of either.

First, then, as administrator of the son: one cause of action only is stated in the pleadings, viz., that which is conferred by the Fatal Accidents Act. This the plaintiff maintains in his quality of administrator of the first decedent—the son.

In considering whether such an action survives the death of the sole beneficiary, its nature, as described by Lord Selborne, L.C., in *Seward v. Vera Cruz*, 10 App. Cas. 59, at p. 67, must be borne in mind. "It is a personal action given for a personal injury inflicted by a person who would have been liable to an action for damages, manifestly in the common law courts, if the death had not ensued. (The) Act gives a new cause of action clearly, and does not merely remove the operation of the maxim *Actio personalis moritur cum personâ*, because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife, (parents), and children, no doubt suing in point of form in the name of his executor." And in the same case, *per* Lord Blackburn (p. 70): "It is plain enough that if a person dies under the circumstances mentioned (in the Act), when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which . . . is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who under such circumstances suffers pecuniary loss by the

death. That is a personal action, if personal action there ever can be." And see *Erdman v. Walkerton* (1893), 20 A.R. 444, 460. This language I emphasize, though for a different purpose from that which the learned law lords who used it had immediately in view, namely, for the purpose of shewing that the action is an action of tort, a personal action—a common law action, Lord Selborne calls it—founded upon an injury to the person of the deceased, which has caused his death and has also thereby caused pecuniary loss to the persons by or for whose benefit the action may be brought.

The damages recoverable in such an action are strictly unliquidated damages, calculated with reference to the reasonable expectation of the beneficiary of pecuniary benefit from the continuation of the life. The mother of the decedent might, if she had been so minded, have brought the action in her own name, as provided by 49 Vict. ch. 26, sec. 1 (O.), now R.S.O. 1897 ch. 166, sec. 8, but this cannot affect the question, for, where the executor sues, the action is still in substance the action of the beneficiary.

That the principle expressed in the maxim *Actio personalis moritur cum personâ* is still recognized, though the sphere of its application is limited by modern as well as ancient legislation, we see by a reference to Consolidated Rule 394: "An action shall not become abated by reason of the death of any of the parties if the cause of action survives or continues." And the principle is thus stated in the note to *Wheatley v. Lane* (1669), 1 Wms.' Saunds., ed. of 1871, 239: "It was a principle of the common law, that if an injury were done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person to whom, or by whom, the wrong was done. . . . But this rule was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed, for there the action survived."

I refer on this point to *Finlay v. Chirney* (1888), 20 Q.B.D. 494, judgment of Bowen, L.J., and to *Hegerick v. Keddie* (1885), 99 N.Y. 258, where the whole subject is very learnedly considered. There is nothing in the fact that the action is a statutory action, to exclude the application of the principle.

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The action then being such as I have described, and not within any of the exceptions just mentioned, it is clearly one which, unless saved by some statutory enactment, comes to an end with the death of the sole beneficiary before trial, whether suing in her own name or in point of form by the administrator of the deceased.

Death after verdict or after judgment involves other considerations not pertinent to the question before us: *Sibbald v. Grand Trunk R.W. Co.* (1890), 19 O.R. 164; *Kramer v. Waymark* (1866), L.R. 1 Ex. 241.

The action being a statutory one for a liability newly created, which did not exist at common law, the courts will not, by any liberality in the construction of the language of the Act, extend it to cases, or for the benefit of persons, not coming within its precise terms. There is nothing in the Act to support the contention that the action may be brought or continued by the administrator of the first decedent for the benefit of the representatives of a deceased beneficiary, *i.e.*, for the estate of the beneficiary. On the contrary, all its provisions of the Act plainly contemplate a proceeding for the benefit of a living person. Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death has been so caused, *i.e.*, as in sec. 2, and damages are to be given proportioned to the injury resulting from the death to the persons for whose benefit the action has been brought, and shall be divided among the before-mentioned parties: sec. 3.

The plaintiff in his statement of claim shall set forth or deliver therewith full particulars of the persons for whom and on whose behalf the action has been brought: sec. 7.

The action must be brought within a year from the death of the deceased; the action may be brought by or in the name or names of all or any of the persons for whose benefit it would have been brought if brought in the name of the executor of the deceased, and shall be for the benefit of the same person or persons: sec. 8.

At the trial, therefore, of such an action it must be proved as part of the plaintiff's case, that the particular beneficiaries for whom it is brought are in being, and no right is given

to recover damages for their representatives or the estate by an action commenced before or continued after the death of any beneficiary: *Safford v. Drew* (1854), 3 Duer 627; *Woodward v. Chicago, etc., R.W. Co.* (1868), 23 Wisc. 400.

Under the Trustee Act, R.S.O. 1897 ch. 129, sec. 10, the administrator of any deceased person may sue for all torts or injuries to the person of his intestate, and recover damages therefor as the latter might have done if living: *Mason v. Peterborough* (1893), 20 A.R. 683, and such damages when recovered form part of the personal estate of the deceased. But the fact that death may have afterwards resulted from the tort forms no element of the damages in such an action. Regarded as the action of the son's administrator, the case at bar is not one brought under the Trustee Act, but is simply the statutory action under the Fatal Accidents Act, the damages in which are the property of the beneficiary. I am, therefore, of opinion that it abated on the death of the mother of the deceased, who, and who alone, was the meritorious cause of the action.

Then, secondly, whether the plaintiff can sue as administrator of the second decedent—the mother. He puts his case, as I understand it, upon the section just referred to of the Trustee Act, R.S.O. 1897 ch. 129, which provides that the executors or administrators of any deceased person may maintain an action for all torts or injuries to the person or to the real or personal estate of the deceased, but such action shall be brought within one year after his decease. The plaintiff argues that, as the death of the first decedent was an injury to the personal estate of the second decedent, an action lies for the executor or administrator of the latter under this section.

It seems almost an abuse of terms to speak of the injury which is the subject of the action given by the Fatal Accidents Act as a tort or injury to the personal estate of the beneficiary, within the meaning of sec. 10 of the Trustee Act, which was passed altogether *alio intuitu*. "Personal estate" in that section means personal property, capable—just as real property or its owner is capable—of being the subject of a tort or injury. The statutory right to recover damages for a tort which has caused the death of a third party, can in no just sense be said

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to be a tort to the personal estate of the party on whom the right of action is conferred, even though such damages are to be calculated with reference to what the tribunal may consider the probable pecuniary benefit which has been lost by the death. Had the second decedent—the beneficiary—brought this action, it would not have been any more than, as actually constituted it is, an action for a tort or injury to the personal estate as such. But, in brief, the answer to the plaintiff's contention on this head is, that an action under sec. 10 is not such an action as is given by the Fatal Accidents Act, the only action in which the death forms an element of the damage.

Only one action is thereby given against the wrongdoer, whether brought by the personal representative or by one or all of the beneficiary class, and it must be brought within twelve months after the death of the person injured. If the section of the Trustee Act applied, there might be as many actions as there were deceased beneficiaries, the time for bringing which would be a year from their deaths respectively.

I have considered the recent case of *Meekin v. Brooklyn Heights R.W. Co.* (1900), 58 N.E.R. 50, in which the administrator of a deceased beneficiary was held entitled to recover in circumstances somewhat like those in the present case. I think it is sufficient to say that the decision turns very much upon the precise language of the New York Acts, which differ in many respects from ours, and can therefore be no guide for us, though there is no doubt much to be found in the judgment which favours the respondent's view. The question (or questions) submitted must therefore be answered in the negative.

I refer also to *Bowker v. Evans* (1885), 15 Q.B.D. 565; *Railroad v. Bean* (1895), 94 Tenn. 388; *Loague v. Railroad* (1892), 91 Tenn. 458; *Moe v. Smiley* (1889), 125 Pa. St. 136; *Cameron v. Milloy* (1872), 22 C.P. 331; *Broom's Maxims*, 7th ed., p. 685.

And as to abatement of action for statutory penalties on death of plaintiff or defendant, see *Kirkham v. Wheely* (1695), 3 Salk. 282; *Moses v. Wooster* (1885), 115 U.S. 285; *United States v. DeGoer* (1889), 38 Fed. R. 80; *Reed v. Cist* (1821), 7

Serg. & R. 183; *Fairley v. Davis* (1844), 6 Ala. 375; *Estis v. Lenox* (1800), Cam. & Nor. 72.

MACLENNAN, J.A.:—The only difficulty I have felt in this case is caused by sec. 10 of the Trustee Act, R.S.O. 1897 ch. 129, which seems to be literally applicable to, and to include a case like the present. It enacts that “the executors or administrators of any deceased person may maintain an action for all torts or injuries to the person . . . of the deceased . . . in the same manner, and with the same rights and remedies, as the deceased would, if living, have been entitled to do; and the damages, when recovered, shall form part of the personal estate of the deceased.” What is complained of here is a tort or injury to the person of the deceased, for which he, if living, would have been entitled to maintain an action. The statement in the case is that he was in the employment of the defendants, and that by their negligence he was instantly killed. It seems plain that the case is within the language of the section, for if the deceased had not been killed the injury was one for which he, while living, would have been entitled to maintain an action. If that enactment had stood alone, the answer to the question in the stated case must, in my opinion, have been that, as administrator of the estate of the deceased, a cause of action had survived to the plaintiff.

There is, however, a difficulty in putting a literal construction upon this section. It was first enacted in 1886 by 49 Vict. ch. 26, sec. 1 (O.), with an amendment in the following year, 50 Vict. ch. 7, sec. 33 (O.), limiting the time for bringing an action to one year after the decease of the person injured. At that time, and for many years previously, what is commonly called Lord Campbell’s Act was in force, now R.S.O. 1897 ch. 166, making express and very minute provision for actions to be brought in cases of tort and injury, followed by the death of the person injured. That Act provided that in such cases an action might be brought in the name of the executor or administrator of the deceased, but for the benefit, not of the estate, but of the wife, husband, parent, and child of the deceased. It was also provided that if no action should be brought by the executor or administrator within six months, it

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might be brought afterwards, within other six months, in the name of any one or more of the beneficiaries, but for the benefit of all. Now, there is no reference to the old Act in the new section. The Legislature intended them both to stand and have their due effect, and they have both been re-enacted in the Revised Statutes. It is evident that a literal interpretation of sec. 10 would cover the ground occupied by Lord Campbell's Act, and would conflict with it. The action provided for by sec. 10 is for the benefit of the estate of the deceased, while the other is for the benefit of certain named relatives. It is not conceivable that the Legislature intended that, in the case of wrongs followed by death, the wrongdoer should be subjected to two different actions by the same executor or administrator, and for the same wrong; and a construction involving such a result should, if possible, be avoided. I think, therefore, we should hold that Lord Campbell's Act, making express and special provision for a limited class of wrongs, viz., those cases in which death has been caused by the wrongful act, and for those only, those cases should be excepted from the operation of sec. 10, which applies only to torts and injuries unconnected with the death of the deceased: *Seward v. Vera Cruz*, 10 App. Cas. 59.

That being so, I think Lord Campbell's Act, and that alone, governs this case, and that the plaintiff could recover nothing, unless it were for the benefit of the mother of the deceased or her estate. Unfortunately the mother died before trial, and she was the only beneficiary within the statute. The question then is whether the action did not abate by her death, and I am of opinion that it did. The statute, sec. 3, says: "Every such action shall be for the benefit of the wife, husband, etc., and shall be brought by and in the name of the executor or administrator." The cause of action, therefore, is that of the beneficiary, or beneficiaries, if more than one. If there be no beneficiary, then there can be no action; the executor or administrator could not bring any, and the only beneficiary having died before trial, the rule *Actio personalis moritur cum personâ* applies, and the action must be taken to have abated. No doubt the rule is practically abrogated by sec. 10 as to all torts and injuries to which that section applies; but being, as I

think we must hold, inapplicable to cases of injury causing death, the rule must still apply to them.

The questions in the case must, therefore, be answered in the negative.

LISTER, J.A. :—I am of the same opinion.

Appeal allowed.

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[IN THE COURT OF APPEAL.]

GUNN V. HARPER.

High Court of Justice—Jurisdiction—Foreign Land—Trusts.

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An action will not lie in this Province for a declaration that, under a transaction entered into outside Ontario, land situate beyond the limits of the Province is held by the defendants as mortgagees and for redemption, even though the defendants reside in the Province at the time of the bringing of the action against them, and took from the original grantee with notice of the plaintiff's rights.

Judgment of Meredith, C.J., 30 O.R. 650, affirmed, MACLENNAN, J.A., dissenting.

APPEAL by the plaintiff from the judgment of Meredith, C.J., reported 30 O.R. 650.

The action was brought to have it declared that a conveyance made in the year 1878, by the plaintiff to the defendant Gunn of lands situate in the Province of Quebec and State of Colorado though absolute in form was in fact taken as security only and for redemption and for other relief. The action was dismissed by the learned Chief Justice on the ground that there was no jurisdiction in the Courts of Ontario to try the question.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 2nd of April, 1900.

Aylesworth, Q.C., and Macdonnell, Q.C., for the appellant. The judgment appealed from proceeds on the erroneous assumption that the relief asked for is relief *in rem* whereas it is in reality merely relief *in personam*. It is well settled that the Courts will decree the foreclosure of a mortgage of foreign

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land: *Paget v. Ede* (1874), L.R. 18 Eq. 118; *Strange v. Radford* (1887), 15 O.R. 145. Redemption is merely the converse of foreclosure and there is no reason why that relief should not also be granted. In *Norris v. Chambres* (1861), 29 Beav. 246, affirmed 3 DeG. F. & J. 583, and the other cases cited in the judgment below, relief *in rem* was asked for. In the present case there is no question of title but merely a question of contract and as incidental to that, the request for the enforcement of the contract if made out. Upon the plaintiff's view of the matter, which, for the purposes of this objection to jurisdiction must be taken to be the correct one, there is between the parties privity of contract and a subsisting trust. There is no difficulty in enforcing the judgment and the Courts of this Province have jurisdiction: *Penn v. Lord Baltimore* (1750), 1 Ves. Sr. 444; *Carteret v. Petty* (1675), 2 Swanst. 323 (n); *British South Africa Co. v. Companhia de Mocambique*, [1893] A.C. 626; *Bryson v. Huntington* (1877), 25 Gr. 265; *Beckford v. Kemble* (1822), 1 S. & S. 7; *Cood v. Cood* (1863), 9 Jur. N.S. 1335. There is no force in the objection raised under the Statute of Limitations. The Ontario Limitations Act does not apply to foreign land, and that is the only statute which is referred to in the pleadings. No evidence has been given as to the foreign law on this question, and there is no presumption of similarity: 13 Am. & Eng. Encyc., 2nd ed., p. 1061. At any rate this is not a question of title but merely a question of procedure.

Whiting, Q.C., for the respondents. The fact that the defendants reside in Ontario is the only possible reason for suing in this Province, and that fact is not sufficient to give jurisdiction. The tendency of the modern cases is to limit the jurisdiction, and the older cases have to be read with caution, because in several of them the land in question, although technically foreign land, was land in countries subject to the dominion of the British Crown: *Westlake on Private International Law*, 3rd ed., p. 196. No case can be found where redemption has been granted. There is no possible way of enforcing the decree if the defendants refuse to reconvey; a vesting order would be useless. It is true that the defendants might be punished for their disobedience, but that would not

transfer the title. The rule is clear, as appears from the cases cited in the judgment below, that the Court will not act where the title to foreign land is directly in question as it is in the present case.

Aylesworth, in reply.

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September 23. OSLER, J.A.:—This is an action for the redemption of an alleged mortgage of foreign lands, some of which are situate in the Province of Quebec, others in the State of Colorado. The plaintiff's case is that although the conveyances of these lands appear to be absolute in form without any defeasance or right of redemption expressed therein, they were made solely for the purpose of securing the defendant Alexander Gunn and the firm of A. Gunn & Co. the repayment of advances made or to be made by the firm on the plaintiff's account, and of debts otherwise due to A. Gunn or his firm. The defendants Harper & Craig in their quality of partners of the firm of A. Gunn & Co., and the defendants Craig & Murray in their quality of assignees in trust for the creditors of the firm, deny that the conveyances were intended as security or as other than absolute conveyances as therein expressed in consideration of an existing debt due by the plaintiff to Gunn and his firm, and of the assumption by the latter of a large debt due by him to the Bank of Montreal, and they plead a subsequent assignment of the same properties made by the defendant Alexander Gunn to the firm and assignments and transfers by the firm to the assignees as trustees. They also plead the Statute of Frauds denying the existence of any declaration in writing of the trust relied on by the plaintiff, and lastly they say that they have acquired title to the land under the Statute of Limitations, R.S.O. 1897, ch. 133.

The defendant Alexander Gunn pleads admitting the plaintiff's case as stated by him.

At the trial before Meredith, C.J., it was proved that the conveyance of the land in Colorado was made in the Province of Quebec. It is in the form of an ordinary quit claim, and without covenants. The expressed consideration is \$10,000. The grantor is one Andrew B. Shearer, the connection between whom and the plaintiff as regards the latter's interest is not

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explained. The Quebec lands were conveyed by an ordinary notarial deed, executed there in accordance with the practice of conveyancing which prevails in the lower Province whereby the plaintiff, in consideration of \$5,000, acknowledged to have been paid, bargained and sold to Alexander Gunn the property therein described.

At the date of these conveyances the plaintiff resided in Montreal, and all the defendants resided and have ever since resided and are domiciled at Kingston in this Province.

The learned trial Judge disposed of the case on the ground that although the action would have lain against the defendant Alexander Gunn alone had he not conveyed the lands to the other defendants, the courts of this Province had no jurisdiction to declare the other defendants constructive trustees of foreign lands, and he was also of opinion that the defence of the Statute of Limitations raised a question of title which could not be determined by our courts.

No evidence was given or offered of the foreign law upon any of the questions involved in the action.

Although there is no finding of fact as to the circumstances under which the deeds were executed or whether they were in fact taken as security for advances made or to be made by or for debts due to Alexander Gunn or his firm, it does not, in my opinion, admit of doubt that if they had related to lands within the jurisdiction, or if the transaction between the parties though relating as it does to lands without the jurisdiction had taken place and the deeds had been executed within the jurisdiction the plaintiff would, notwithstanding their form be entitled to redemption. The manner in which the transaction originated, the entries in the books of the firm, the correspondence between the firm and the plaintiff, and the history of their dealings with the land as disclosed in the books and correspondence, all point to the conclusion that it was in its inception a transaction with or on behalf of the firm, and that the property was taken, and therefore continued to be held, until the defendants, in 1893, assumed to close out the plaintiff's interest as security merely for moneys due and which might thereafter become due on account of advances made by the firm. The name of Alexander Gunn, a member of

the firm, was used for the firm as that of the other party to the bargain. He was from the outset simply the firm's trustee. The difficulty in the plaintiff's way is that the equity he seeks to enforce, through undoubtedly one recognized and administered by our law even in respect of foreign lands when arising out of circumstances occurring within the jurisdiction of our courts, arose within a foreign jurisdiction and relates to and affects the title to lands within that jurisdiction. Whether, therefore, such an equity exists at all under the circumstances depends not upon our law but upon the *lex loci rei sitæ*.

In *Ex parte Pollard* (1840), Mont. & Ch. 239, an equitable mortgage by deposit according to the English law was effected in England of a Scotch estate. By the law of Scotland no lien or equitable mortgage on the estate in question was created by the deposit. It was held, nevertheless, that the parties contracting as well as the assignees in bankruptcy under a subsequent fiat against the mortgagors being resident in England the property came to the hands of the assignees charged with the equity and they were, therefore, bound to pay the mortgage debt out of the proceeds of the land. Lord Cottenham said: "Contracts respecting lands in countries not within the jurisdiction of these courts can only be enforced by proceedings *in personam*, which courts of equity now are constantly in the habit of doing: not thereby in any respect interfering with the *lex loci rei sitæ*. If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contract might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities." See Westlake on Private International Law, 3rd ed., sec. 172, where a part of this passage is cited. See also *Ex parte Holthausen* (1874), L.R. 9 Ch. 772; *Coote v. Jecks* (1872), L.R. 13 Eq. 597.

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The equity admitted in these cases arose in England out of transactions which took place between parties there, and were such as the English law recognized as flowing therefrom quite independently of the question whether they existed in the country of the *situs*.

The same restriction upon the jurisdiction of our courts to administer relief in respect of a mortgage of foreign lands is recognized by the Master of the Rolls in *Norris v. Chambres*, 29 Beav. 246, as explained by him in *Cookney v. Anderson* (1862), 31 Beav. 452, at p. 464, and by the present Chief Justice of the Supreme Court in *Purdum v. Pavey* (1896), 26 S.C.R. 412, at p. 418. Were we in this case to give the plaintiff a redemption decree we should deprive the defendants of the absolute title which they now appear to possess to the lands in question by affirming an equity to exist between the parties arising out of a transaction which did not occur in this country, and which by the law of the country where it did occur may not in fact be annexed to it. I am, therefore, of opinion that the *forum domicilii* is not that in which the action should be brought, and that the appeal should be dismissed.

Moss, J.A.:—The plaintiff, a resident of London, England, brings this action against the defendants, residents of Kingston, Ontario. The substantial claim is to cut down two conveyances of real property made by the plaintiff to the defendant Alexander Gunn in the year 1878 from grants of the title absolutely to mortgage securities. At the time of the execution of the conveyances in question the plaintiff was a resident of Montreal, in the Province of Quebec, and the instruments were executed in that city. One is of lands situate in the Province of Quebec, and is in the form appropriate for the conveyance of real estate in that Province. The other is of mining lands situate in the State of Colorado, and appears to transfer the absolute title.

The plaintiff's claim is that although these conveyances are absolute in form they were only intended to be securities in Alexander Gunn's hands for advances made and to be made to or on behalf of the plaintiff.

The question to be tried was whether at the time of the execution of the instruments they were intended to operate according to the form as conveyances of an absolute indefeasible title to Alexander Gunn or whether he was only to acquire from the plaintiff another and different title. It is not pretended that there was any mistake in making the conveyances in the form in which they are, or that the plaintiff was induced by fraud to execute them instead of instruments shewing their defeasible character. Evidence has been given as to the nature of the transaction which, if properly received, goes far to sustain the plaintiff's claim.

But the first question is whether the Court has jurisdiction to entertain the action and to pronounce judgment to the effect that the title which Alexander Gunn acquired under or by virtue of the conveyances in question to the lands in Quebec and Colorado embraced therein was not an absolute title but a defeasible title.

To begin with, there is nothing on which to found the jurisdiction but the fact that the defendants are resident in Ontario.

The conveyances are of lands not in Ontario; they were not executed in Ontario, and the alleged bargain by which their effect was to be different from what appears on their face was made in Montreal. Letters and entries in books written and made subsequently to the execution of the conveyances tending to shew that the bargain was such as the plaintiff contends it was, were put in evidence. But they are only evidence. They are not the bargain. As a new contract they would not be supported by a consideration. Their service must be as evidence in support of the real bargain alleged by the plaintiff.

The alleged contract or equity upon which the plaintiff's claim is based was made or arose in the Province of Quebec in which one of the parcels of land is situate, and in which the conveyances of all the parcels were executed. Nothing appearing to the contrary it must be assumed that the parties to the conveyances intended the contract or equitable obligation to be governed by the *lex rei sitæ*. The case is, therefore, one in which, if it is to be held that the conveyances are in fact mortgages it should be so held by the courts of the *situs*. If,

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upon their face, the instruments appeared to be mortgages this action would still be open to the full force of Sir John Romilly's observation in *Norris v. Chambres*, 29 Beav. 246, at p. 255: "If the owner of an estate in Prussia mortgage that estate to an Englishman, it is new to me that the courts of equity in this country will administer, as between those persons, the law obtaining in England with relation to mortgages, and foreclose or direct a sale of the Prussian estate, if payment be not made of the amount due."

Here it is sought to carry the law further. It is not even the comparatively simple case of an Ontario mortgage of lands out of Ontario, the mortgagor resident here and the mortgagee seeking in the courts here a foreclosure of the equity of redemption: *Paget v. Ede*, L.R. 18 Eq. 118. In the present case it must first be established that the relationship of mortgagor and mortgagee exists with reference to the lands in question, and that being established the Court is asked to work out a redemption judgment. It is clear that the Court could not do so to the same extent as in the case of lands situate in Ontario. I take it that in the event of the plaintiff mortgagor making default in payment of the amount found payable for redemption of the lands the defendant mortgagees could not avail themselves of the provisions of Consolidated Rule 392, and bring before the Court subsequent incumbrancers upon the lands and take as against them the proceedings for redemption or foreclosure provided for by the Rule.

It may not be a conclusive test, but it is worth considering, that if the defendants were the parties who were claiming that the conveyances were in reality mortgages they could not maintain an action to enforce their rights in the courts of this Province, for neither the mortgagor nor the mortgaged lands are within the jurisdiction, nor is there any contract to be performed in Ontario.

I have not met with any case where an action, of which land situate abroad was the subject, has been held maintainable on the sole ground that the defendant was resident within the jurisdiction, though there are cases relating to other subjects in which residence alone has enabled the Court to exercise jurisdiction.

In the cases upon which the plaintiff has mainly relied it seems to be the case that not only were the parties, or at all events the defendants, resident within the jurisdiction, but the contract or equity between the parties on which the right to maintain the action was based was made or arose within the jurisdiction. This is pointed out as regards some of the earlier cases by Sir John Romilly, M.R., in *Cookney v. Anderson*, 31 Beav. 452. Referring to his judgment in *Norris v. Chambres*, he said (p. 465): "But although the absence of privity between the plaintiff and defendant disabled the Court from interfering in that case it does not, therefore, follow that this Court will interfere in every case where there is a privity of contract between the plaintiff and defendant. In *Norris v. Chambres* both the plaintiff and defendant were domiciled in England, and yet the Court would not interfere. Besides which, the privity of contract spoken of by me had reference to a contract entered into in England between Englishmen, and it is by reason of the existence of such a contract that the decrees in *Penn v. Lord Baltimore* and other cases of a similar character were enforced, namely, that as the Court of Chancery acts *in personam* of the defendant, it may indirectly and by virtue of this power, act upon his immoveable property in a foreign country. This is also to be observed, that in those cases there was no question but that, as between the plaintiff and defendant, this Court had full authority and power to act on the property of either or both within the jurisdiction; but this power and authority flowed from the circumstances that the contract was an English contract, that is, a contract entered into between Englishmen domiciled in England, relating to English affairs, and to be performed in England."

The same principle seems to run through the subsequent decisions in which the Court entertained the action. If this be the correct conclusion the present case falls within the rule stated in Nelson's Cases on Private International Law, p. 148, quoted with approval by the Chief Justice of Canada in *Henderson v. Bank of Hamilton* (1894), 23 S.C.R. 716, at p. 721, as follows: "All questions as to the burdens and liabilities of immoveable estates situate in a foreign country depend, in the absence of any trust or contractual obligation, simply upon the law of the

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country where the real estate exists; wherefore if the contested claim is based upon the right to land, and must be determined by the *lex loci rei sitæ*, and the only ground for instituting proceedings in this country is that the defendants are resident here, the courts of this country have no jurisdiction."

To the same effect are *In re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; and *Purdom v. Pavey*, 26 S.C.R. 412. In the latter case the Chief Justice of Canada uses the following language (p. 418): "Then whether the allegation of a 'trust' of the purchase money secured by the mortgage which the plaintiffs allege, is to be considered as an averment of a trust by operation of law consequent upon the illegality of the transaction or as an allegation of a conventional express trust, in either case the question would depend on the *lex rei sitæ*, and from this alone it follows that the forum of the *situs* is the proper forum."

For these reasons I am in favour of affirming the judgment appealed from.

LISTER, J.A.:—I agree with the judgment just read.

MACLENNAN, J.A.:—I think the appeal should succeed.

If the land had been in Ontario there could be no question of the plaintiff's right to a judgment for redemption.

The defence set up by the defendants, other than Alexander Gunn, is that the original transaction was one of sale, and not of mortgage; that the plaintiff conveyed the lands to Alexander Gunn in consideration of a debt of about \$21,000 due to Alexander and \$4,000 due to the firm of A. Gunn & Co., composed of the defendants Alexander Gunn, Harper and Craig, in addition to the liability of \$50,000 assumed for him to the Bank of Montreal; that this conveyance was absolute and not redeemable. The defence then goes on to say that the firm, immediately after the conveyance, entered into possession of the lands, and received the rents and profits, and paid out of these funds the notes for \$50,000 to the Bank of Montreal as they became due. It is, therefore, admitted that whether the transfer of November, 1878, was an absolute purchase, or only a security, it was a transaction between the plaintiff and the

firm of A. Gunn & Co., as well as the defendant A. Gunn. Now it is proved, beyond all possibility of controversy, that the transaction was not a sale but a security, and that the conveyances made by the plaintiff to Alexander Gunn were by way of mortgage, and for the purpose of securing the repayment of his debt to his brother, and his brother's firm, and the further indebtedness to arise from the security given to the Bank of Montreal for \$50,000.

Such having been the form and nature of the transaction of 1878, the firm immediately took possession of the property and assumed the management thereof, charging the plaintiff in their books at Kingston, where they carried on the other business of the firm, with all expenses and outgoings in connection with the lands, as well as with the payment of the notes to the Bank of Montreal, and also with interest, and crediting him in the same account with all the returns from the property, and bringing down the balance due to them from the plaintiff year by year, and charging interest on the yearly balances. This continued down to the year 1893; and during the interval numerous letters were written by, and in the name of, the firm to the plaintiff, relating to the business and management of the properties.

This course of dealing continued until the year 1893, when the firm assumed to put a valuation on the properties, and to credit the plaintiff's account in their books with the assumed valuations; and by several deeds in that and the following year, Alexander Gunn for a nominal consideration vested the title to the several properties, which, up to that time, stood in his own name alone, into the names of himself and his two partners. In the following year (1894) the firm having become embarrassed in its affairs, made an assignment of all its property to Craig, a member of the firm, and the defendant Murray, as trustees for the benefit of creditors.

The defendants did not plead the want of jurisdiction as a defence, but raised it at the trial, before the learned Chief Justice, who gave effect to it, and dismissed the action.

He was of opinion that but for the conveyances made by the defendant Alexander Gunn to his firm, and by the firm to Craig and Murray, and if the action had been against Alexander

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Gunn alone, the defence of want of jurisdiction could not have prevailed.

If the other defendants had been strangers to the property until 1893-4, it might well be that a question of title would then be raised which could not be litigated in this Province; but inasmuch as the original deeds were made for the security of the firm as well as of Alexander Gunn, it follows that the firm were in effect mortgagees from the beginning, and they had a redeemable interest all the time. And as regards the assignees for creditors, they could claim no higher rights than their assignees.

The case then, in my opinion, resolves itself into a simple redemption action, as to which it has never been disputed that an action may lie respecting lands in a foreign jurisdiction.

The cases on the general subject of actions relating to lands in a foreign country have been so fully cited and discussed in recent cases in this Court, and in the Supreme Court of Canada, that it would serve no useful purpose to go over them again. I refer to *Henderson v. Bank of Hamilton*, 23 S.C.R. 716; and *Purdum v. Pavey*, 26 S.C.R. 412, both reported in this Court, and in the High Court, as well as in the Supreme Court. In a more recent case referred to by the Chief Justice in the Court below, *Black Point Syndicate v. Eastern Concessions* (1898), 15 Times L.R. 117, the cases are gone over by Stirling, J., and the principle is restated. The cases are also collected in Dicey on the Conflict of Laws, pp. 216-218, and Westlake's Private International Law, 3rd ed., p. 196, and *Penn v. Lord Baltimore*, 1 W. & T. L.C., 7th ed., p. 755.

I have felt some difficulty by reason of a dictum of Romilly, M.R., in *Norris v. Chambres*, 29 Beav. 246. The case itself has little bearing on the present, being one resembling *Henderson v. Bank of Hamilton*, brought to establish a lien on foreign lands. But at p. 255 the Master of the Rolls says: "If the owner of an estate in Prussia mortgage that estate to an Englishman, it is new to me that the courts of equity in this country will administer, as between those persons, the law obtaining in England with relation to mortgages, and foreclose or direct a sale of the Prussian estate, if payment be not made of the amount due." This statement would deny the jurisdiction of the Court, in all cases of mortgage of foreign lands, to decree

foreclosure. Mortgage by the owner, of course, means any mortgage, for no one but the owner could make a mortgage; and if there could be no foreclosure of a mortgage to an Englishman, much less could there be such in an English Court, of a mortgage to a foreigner. The statement of the Master of Rolls, therefore, is that it is new to him that a mortgage of foreign land could be foreclosed in an English Court. The statement is a mere dictum, and I cannot help thinking that it is misreported. I do not find the jurisdiction in cases of mortgage of foreign lands doubted anywhere else; and I find it often exercised, and frequently admitted. The case before Sir John Romilly was in 1860, and *Paget v. Ede*, in 1874, L.R. 18 Eq. 118, is an express decision in favour of the jurisdiction, although it was contested in argument, and *Norris v. Chambres* was cited. In giving judgment Bacon, V.-C., said: "I cannot for a moment doubt the jurisdiction of the Court, and the right of the plaintiff to the relief he asks for in exercise of that jurisdiction"; and in *Bent v. Young* (1838), 9 Sim., at p. 190, Shadwell, V.-C., expresses his opinion to the same effect, with respect to redemption. See also 2 Comyn's Dig., 676: Tit. Chy. (3X) Jurisdiction; *Toller v. Carteret* (1705), 2 Vern. 495; *Beckford v. Kemble*, 1 S. & S. 7.

The action then is for the redemption of a mortgage, against the mortgagees, who have been in possession and in receipt of the rents and profits of the mortgaged lands from the beginning. It is brought in this Province where the defendants all reside, and where they managed the property, received the profits, and kept the accounts, during the whole period, and where, I think, it clear they are properly accountable. It is also noticeable that the conveyances under which all the defendants other than Alexander Gunn claim title were executed in Ontario. The assignment for the benefit of creditors can have no effect upon the jurisdiction, the assignees being also within the jurisdiction.

In my opinion the plaintiff is entitled to the usual redemption judgment.

Appeal dismissed; MACLENNAN, J.A., dissenting.

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BANQUE PROVINCIALE V. ARNOLDI.

Bills of Exchange—Alteration—Joint and Several Liability—Principal and Surety—Judgment.

The insertion by the holder of a promissory note signed by several persons, some of whom are sureties for the others, of the words “jointly and severally” before the words “promise to pay” is a material alteration which avoids the note, and the subsequent cancellation of the words by the holder does not do away with the effect of the alteration, even though the makers of the note do not know of the alteration until after the cancellation.

A promissory note made by several persons, some of whom are sureties, given to the holder after such alteration in renewal of the original promissory note, and in ignorance thereof, cannot be enforced as against the sureties, there being no consideration to support it.

Accepting in renewal of a promissory note, some of the makers of which are to the knowledge of the holder sureties, of a promissory note not signed by one surety discharges the co-sureties.

A judgment recovered against debtors in their firm name for a firm debt is not a bar to the recovery of judgment against them individually upon a promissory note given by them as collateral security for the same debt.

Judgment of STREET, J., varied.

APPEAL by the defendants other than King Arnoldi, from the judgment at the trial.

The defendants E. C. Arnoldi, E. D. Arnoldi, and H. L. Bowie, who carried on business in partnership under the name of The Citizens' Exchange and Loan Agency, discounted paper under that name with the plaintiffs to the amount of nearly \$5,000. As collateral security for the accommodation a note for \$5,000 was given to the plaintiffs, made by these defendants in their individual names and by the defendants H. W. Bowie, King Arnoldi, Kirby, and St. Jacques. This note fell due on the 10th of May, 1899, the debt of the Loan Agency to the plaintiffs being then \$4,800, and a new note for that sum, made by all the defendants except King Arnoldi, was then given to the plaintiffs. The plaintiffs contended that they had reserved all rights upon the \$5,000 note and claimed payment as against all the defendants. The defence was that the \$5,000 had been made void by the insertion in it by the plaintiffs' manager without the knowledge and consent of the defendants, of the words “jointly and severally” before the words “promise to pay,” though these words had afterwards been cancelled by

him; that the \$4,800 note was signed upon the condition known to the plaintiffs, that King Arnoldi should also sign; and, as to the defendants E. C. Arnoldi, E. D. Arnoldi, and H. L. Bowie, that the plaintiffs had taken judgment against them for the same debt upon the note made by them in the partnership name.

The action was tried at Ottawa on the 31st of October, 1900, before Street, J., who held that the \$5,000 note had been made void by the alteration, but that the \$4,800 note had been taken by the plaintiffs in good faith and without knowledge of the condition and could be enforced against all the defendants except King Arnoldi. He also held that as to King Arnoldi the plaintiffs did not better their position by falling back on the original consideration as that was the loan to the agency company only. He also negatived the defence as to the previous judgment.

The appeal was argued before ARMOUR, C.J.O., OSLER and MACLENNAN, JJ.A., on the 26th of March, 1901.

J. F. Orde, for the appellants Kirby and St. Jacques. The insertion in the \$5,000 note of the words "jointly and severally" rendered it void, and the subsequent cancellation of the words was of no avail to restore liability. The \$4,800 note was given if at all in renewal of the \$5,000 note and in ignorance of its avoidance, and there was no consideration to support the renewal: *Byles on Bills*, 15th ed., p. 338; *Bell v. Gardiner* (1842), 4 M. & G. 11. The evidence, too, is that the procuring of the signature of King Arnoldi to the \$4,800 note was made a condition by these appellants, who were unwilling to accept the responsibility of sureties unless he shared it. The plaintiffs knew this and accepted an incomplete instrument which cannot be enforced: *Foster v. MacKinnon* (1869), L.R. 4 C.P. 704; *Lewis v. Clay* (1897), 67 L.J.Q.B. 224; *Awde v. Dixon* (1851), 6 Exch. 869; *Ontario Bank v. Gibson* (1886), 3 Man. L.R. 406; (1887), 4 Man. L.R. 440; *Brown v. Howland* (1885), 9 O.R. 48, at pp. 65, 66. The plaintiffs were payees of the note and not "holders in due course," and even if they did not know of the condition they are affected by it: *Baxendale v. Bennett* (1878), 3 Q.B.D. 525. E. C. Arnoldi had only a limited right to deal with the note, and his delivery of the note

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to the plaintiffs was not a negotiation of it but at most an issuing of it: *Lewis v. Clay*, 67 L.J.Q.B. 224, and they acquired no better right than he had: *Master v. Miller* (1763), 1 Sm. L.C., 10th ed., 747. Apart from this the appellants were to the knowledge of the plaintiffs sureties only, and the plaintiffs were bound to preserve for their benefit the liability of the co-surety: *Bonser v. Cox* (1841), 4 Beav. 379; *Leaf v. Gibbs* (1830), 4 C. & P. 466; *Traill v. Gibbons* (1861), 2 F. & F. 358; *Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755; *Mercantile Bank of Sydney v. Taylor*, [1893] A.C. 317; DeColyar on Guarantees, 3rd ed., pp. 221, 223; Rowlatt on Principal and Surety, pp. 3, 4, 268, 269.

R. G. Code, for the appellants, E. C. Arnoldi, E. D. Arnoldi, H. L. Bowie, and H. W. Bowie.

Aylesworth, K.C., and *W. H. Barry*, for the respondents. The judgment appealed from is right in holding that the defendants are liable in respect of the \$4,800 note, which was taken in good faith and without any knowledge or notice of any condition, and the existence of such a condition is not proved. The \$4,800 note was not a renewal note but was a new and complete instrument, valid and enforceable. But if it is not good the plaintiffs are entitled to fall back on the \$5,000 note, which has not been avoided by the alteration. That alteration having been made in good faith to correct an admitted mistake, and subject to the assent of all parties being obtained and having been cancelled as soon as it was decided not to procure the assent, must be treated as if it had never been made: *Byles on Bills*, 16th ed., p. 339. If it is of importance the plaintiffs are not responsible, the manager having no authority to make it. There is nothing in the objection as to the former judgment: the plaintiffs are entitled to take judgment on all their securities so long as they collect the debt but once: *Cavanagh on Money Securities*, 2nd ed., p. 548.

Orde, in reply.

November 6. ARMOUR, C.J.O.:—I am unable to agree with the finding of the learned trial Judge that the manager of the bank at the time he took the \$4,800 note made by all the defendants but the defendant King Arnoldi did not observe the

absence of the defendant King Arnoldi's name from it and that such absence was not called to his attention by the defendant E. C. Arnoldi from whom he received it, for I think that the weight of evidence is the other way, and I think the proper conclusion of fact to be that he was told by the defendant E. C. Arnoldi that the defendant King Arnoldi had not signed it and that he was induced to take it by the assurance of the defendant E. C. Arnoldi that the defendant King Arnoldi would subsequently sign it.

Whatever may be thought of the evidence of the defendant E. C. Arnoldi in this regard standing alone, I cannot ignore the corroboration of it by the defendants H. W. Bowie and Kirby more especially as the evidence of the defendant Kirby was not contradicted by the manager, and to this must be added the fact that the manager was taking this note as a renewal of the \$5,000 note, which it would not have been without the signature of the defendant King Arnoldi.

This note, therefore, when given to the manager was, to his knowledge, an incomplete instrument, and being such, no recovery could be had upon it by the bank, the defendant E. C. Arnoldi having no authority to deliver it to the bank until it was signed by the defendant King Arnoldi, it having been signed by the parties who signed it upon the distinct understanding that it was not to be used until all the defendants had signed it, and having been handed after it was so signed to the defendant E. C. Arnoldi upon that understanding: *Aude v. Dixon*, 6 Exch. 869.

But even if this finding of fact by the learned Judge is to stand there could be no recovery upon this note against the defendants who were sureties, for the manager of the bank when he took this note, took it not as an original note but as a renewal of the \$5,000 note made by the defendants of whom the defendants E. C. Arnoldi, E. D. Arnoldi and H. L. Bowie were, under the name of the Citizens' Exchange and Loan Agency, the principal debtors and the other defendants were their sureties as the manager of the bank well knew, and in taking this note as a renewal of the original note the manager of the bank was bound to see that it was in truth a renewal of it, and that it had the signature to it of the defendant King

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Arnoldi, and having taken and used it as he did without his signature the bank must suffer for his neglect and not the co-sureties of the defendant King Arnoldi, and it must be held that such his act and neglect released such co-sureties from their liability upon this note.

It is clear that the bank cannot fall back upon the \$5,000 note and recover against the defendants upon it for this, among other reasons, that the action upon it has been dismissed as against the defendant King Arnoldi, a joint maker of it, on a ground common to all the joint makers of it, and there is no appeal against such dismissal: *Shillings v. Ward* (1863), 2 H. & C. 717.

And it cannot fall back and recover against the defendants for the consideration for the reasons given by the learned trial Judge.

In my opinion, therefore, the appeal must be allowed with costs and the action dismissed with costs.

OSLER, J.A.:—The plaintiffs cannot maintain their action against the defendants King Arnoldi, Kirby, H. L. Bowie and St. Jacques in respect of this \$5,000 note because as to them it was avoided by the alteration made therein, with however innocent intention, by their manager: *Carrique v. Beaty* (1897), 24 A.R. 302, and cases there cited.

As to this I agree with the learned trial Judge.

I am, however, unable to follow him in holding that the defendants H. W. Bowie, Kirby and St. Jacques are liable upon the other note sued on—the note for \$4,800 of the 10th May, 1899.

That note was intended to be given solely as a renewal of the former note. But when they signed it and parted with it to the bank—assuming for the moment that it was then as to them a completed instrument—they had ceased to be liable upon the original note by reason of the alteration which had been made therein by the holders—an alteration of which they were ignorant and to which they never assented. Therefore, there was no consideration to them for making the second note, and the plaintiffs being holders with notice cannot recover against them thereon.

I am also of opinion that these appellants are entitled to succeed upon another ground.

They, together with the defendant King Arnoldi, were parties to the original note as sureties for their co-defendants E. D. Arnoldi, E. C. Arnoldi and H. L. Bowie who composed the partnership firm of the Citizens' Exchange and Loan Agency as the plaintiffs' manager knew, and they signed the renewal upon the express condition that all the parties to the former note should sign it, and that it should not be made use of in any other way as a security until this was done. I think the evidence of the defendant E. C. Arnoldi that the manager knew this when it was handed to him in its incomplete state wanting the signature of King Arnoldi (which has never been in fact obtained) is amply corroborated. As regards those three parties, therefore, the bank never acquired or held it as a complete instrument and cannot maintain any action upon it: *Foster v. Mackinnon*, L.R. 4 C.P. 704; *Lewis v. Clay*, 67 L.J.Q.B. 224; *Brown v. Howland*, 9 O.R. 48, and cases there cited; affirmed (1887), 15 A.R. 750; *Ware v. Allen* (1888), 9 S.C. Reporter 174.

The only remaining question is as to the liability of the other three defendants E. C. Arnoldi, E. D. Arnoldi and H. L. Bowie, on the \$4,800 note, which is of little importance except as regards the costs of the action as the bank has already recovered judgment against their firm on the last of the series of the monthly notes for which this note of the 10th May, 1899, was supposed to be held as collateral.

These defendants by their partner E. C. Arnoldi put forward this note as a completed note for the purpose of inducing the manager to discount their firm's notes at one month, and as a security on the faith of which the manager did in fact discount the latter note, the proceeds of which they received and applied by means of their firm's cheque. I do not think they can now be heard to say that as to them the \$4,800 note was not a valid instrument and, therefore, as to them the judgment should be affirmed and their appeal dismissed.

MACLENNAN, J.A.:—I think the appeal should be allowed.

The action was dismissed as against King Arnoldi, and there is no appeal against that judgment.

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The formal judgment is against all the other defendants, but it is not stated upon which of the notes sued upon it has been granted. This is explained in the reasons for judgment of the learned Judge, wherein he expresses the opinion that the first note, namely, that for \$5,000, was avoided by the alteration made by the plaintiffs' agent without the knowledge or consent of some of the parties thereto. The recovery, therefore, must be taken to be upon the note of the 10th May, 1899, for \$4,800.

I am of opinion that the learned Judge was right in holding that the first note was avoided by the alteration, although it was not made with any wrongful or fraudulent intention. The manager's instructions from the head office were to procure a joint and several note from the parties who were offered as sureties. Unfortunately the note was drawn as a joint note merely, and not joint and several, was signed by all the parties, was brought to the agent, who accepted it and advanced the money upon it, without observing that it was not joint and several. This he discovered a few days afterwards, and sent for Mr. E. C. Arnoldi and drew his attention to it. Mr. Arnoldi said the omission was an oversight, that he intended to make it joint and several. Thereupon the words "jointly and severally" were inserted by the manager with Mr. Arnoldi's concurrence, and it was arranged that they should go together to the parties and get them to approve of the change. This was never done, Mr. Arnoldi and Mr. Bowie, the only other persons aware of the alteration, not caring to go round to get the approval of the other signers. Some days afterwards the manager struck his pen through the words which he had interlined. I think we must hold that the alteration avoided the note, and that its validity was not restored by the subsequent cancellation: The Bills of Exchange Act, 1890, sec. 63; Maclaren on Bills and Notes, pp. 345, 346; Chalmers on Bills, 5th ed., pp. 213, 214; *Master v. Miller*, 1 Sm. L.C. 10th ed., 747.

The first note having been thus avoided shortly after its date in November, 1898, that circumstance has an important bearing upon the question of the liability of the appellants other than Arnoldi and his wife, and Mrs. Bowie, who are the

principal debtors. There is no doubt whatever that the only consideration to these appellants for giving the note of the 10th of May, 1899, was their supposed liability upon the note for \$5,000 which became due upon that day. The new note was signed solely for the purpose of renewing *pro tanto* the old one. This being so, and there being no liability on the old note, there was no consideration for the new one, as between these appellants and the bank, and they are entitled to succeed in their appeal on that ground.

I am also of opinion that it is proved that the appellants Kirby and St. Jacques signed the new note upon the express condition that it should also be signed by King Arnoldi, who had signed the old note with them, and that not having been signed by him, it never became, in the hands of the payees, an obligation binding upon these appellants. I agree with the Chief Justice that the weight of the evidence is in favour of the view that the want of King Arnoldi's name was observed by the manager at the first, and was regarded by him as a defect which ought to be remedied to make it the instrument intended by all the parties. But even if it were otherwise the contract was one between the makers and the bank, and unless it was completed in the manner intended it never became binding. I, therefore, think that these two appellants are entitled to succeed on this ground also: *Lewis v. Clay*, 67 L.J. Q.B. 224; 77 L.T.N.S. 653.

There are also other grounds on which, perhaps, our judgment in favour of the appellants, the sureties, might be rested, but I think the foregoing are quite sufficient.

The case is different as regards the appellants, E. C. Arnoldi and his wife, and Mrs. Bowie, who were the principal debtors. The note for \$4,800 represented a real debt due by them to the bank, and they received the benefit of it. By means of it they paid off the \$5,000 note, on which they were undoubtedly liable, for the alteration was made with the concurrence of a member of the firm. There is, therefore, no reason why they should not be held liable, or why the judgment against them should not be allowed to stand. It was contended that a judgment for the same debt on another note dated the 19th of September, 1899, at one month's date recovered against them

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by their partnership name of the Citizens' Exchange and Loan Agency was a bar to the present action; but the answer to this is that the present action is upon a different contract, and there is no reason why there should not be a judgment upon it, although it be for the same debt.

The appeal of the defendants Kirby, St. Jacques, and H. W. Bowie should be allowed with costs, and the action against them should be dismissed with costs, and the appeal of the other defendants should be dismissed with costs.

Appeal of Kirby, St. Jacques and H. W. Bowie, allowed.

Appeal of other defendants dismissed.

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[IN THE COURT OF APPEAL.]

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PALMER V. JONES.

Indemnity—Bond—Future Payments.

The Court held that College Street in the City of Toronto was, up to the year 1889, a private road to which adjoining owners acquired no right of access; that the reservation upon its dedication in that year by the University of Toronto to the City of Toronto of the right of the University to compel adjoining owners to pay for the right of access was valid; that a covenant by a vendor of land adjoining the street in favour of the purchaser thereof to indemnify him "against the payment of any money, and against all loss, costs or damages he may be obliged to pay to secure access" was therefore enforceable; and that the covenantee could recover not only the amount of payments actually made, but also the amount of payments to be made by him in the future under an agreement by which he agreed to pay for the right of access a sum in instalments.

Judgment of MacMahon, J., 1 O.L.R. 382, affirmed.

AN appeal by the defendant from the judgment of MacMahon, J., reported 1 O.L.R. 382, was argued before ARMOUR, C.J.O., OSLER and LISTER, J.J.A., on the 1st of April, 1901.

E. E. A. DuVernet, and *J. E. Jones*, for the appellant. The defendant, as an inhabitant of the city, had the right to use the street while the lease was in force, and the attempted subsequent restriction when the street was dedicated to the public was of no validity. There was, therefore, no right to compel the payment of any sum for the right of egress. At any rate,

the action is premature. The plaintiff has not been damnified: *Sutherland v. Webster* (1894), 21 A.R. 228. There has been no payment; not even a demand. "Obliged to pay" infers some legal enforcement. The amount claimed is excessive. The right to cross this imaginary line is of merely nominal value: *In re Harvey and Parkdale* (1889), 16 A.R. 468, and the price agreed upon between the plaintiff and the University does not bind the defendant; and he certainly cannot be called upon to pay the costs of the negotiations and agreement.

Robinson, K.C., and *Donald Macdonald*, for the respondent. It is clear that this was at first a private road, and that the subsequent qualified dedication was valid, so that the defendant obtained no right of access. This being so, the plaintiff's right to recover is clear. He was threatened with the absolute stoppage of his right of egress, and was compelled to make a settlement, and he is now entitled to be relieved from liability. To indemnify does not mean to reimburse; it means to prevent loss; and the amount agreed upon in good faith must be furnished to the plaintiff to enable him to discharge his liability.

Jones, in reply.

October 16. The judgment of the Court was delivered by ARMOUR, C.J.O.:—The learned trial Judge has so fully stated the facts necessary for the determination of this case as to render it unnecessary for me to recapitulate them.

The conveyance by the owner in fee of park lots numbers nine and ten to the chancellor, president and scholars of King's College of the land "one chain in width through the centre of park lots numbers nine and ten for a road to Yonge street," was not for a public road but for a private road for the grantees in that conveyance, and there is no ground for the contention that the abutters on a private road have the same right of access from their lands to a private road as they would have were it a public road.

The grantees in this conveyance and their assigns treated this road, as they had the right to do, as a private road, erecting fences on each side of it separating it from the adjoining lands, and excluding the owners and occupiers of the adjoining lands

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from any access to it from those lands, and erecting at its terminus, at Yonge street, gates and a gatekeeper's lodge.

This state of things continued and existed on the 1st day of January, 1859, when the lease was made of this road, with other lands, to the city of Toronto, and there is nothing whatever in that lease which can be construed to work any alteration of the character of this road as a private road; on the contrary, all the terms of the lease shew that its character of a private road was to be preserved and maintained, it being provided therein that the city should put in repair, and at all times thereafter maintain, uphold and keep in a proper state of repair, the said fences, gates and lodge.

Nor is there anything in the agreement of the 19th July, 1883, granting to the city the license or privilege of laying a street railway along the said road which had the effect of changing the character of the said road from that of a private road to that of a public one.

Its character was, however, changed by the agreement of the 2nd day of March, 1889, by which this road was to be and was thereby subject to the conditions therein set forth dedicated by Her Majesty to the public, but this dedication was not to affect the right of Her Majesty to prevent the owners of properties adjacent to it, who had not at its date the right of ingress and egress to the road from their said properties from and to the said road, or any other person or persons who had not at the said date such right of ingress and egress, from exercising such right unless and until the same should have been acquired by payment to Her Majesty or her successors, for the purposes of the University of Toronto, of such sum as might be agreed upon by and between such persons and the bursar.

That the dedication of this road to the public might be lawfully made, subject to these conditions, is shewn by the following authorities: *Fisher v. Prowse* (1862), 2 B. & S. 770; *Mercer v. Woodgate* (1869), L.R. 5 Q.B. 26; *Arnold v. Blaker* (1870), L.R. 6 Q.B. 433.

And it was by the said last mentioned agreement provided that in the event of any such adjacent property owner declining to pay for such right of access, the right of Her Majesty under the said lease of 1st January, 1859, to have fences maintained

separating the said road from the said properties, was to be unaffected by the said agreement, and was to be in the same position as if the said lease was not thereby varied, except that Her Majesty would not call upon or require the corporation to erect or maintain any such fence, but would at the cost, charge and expense of the University of Toronto, cause the same to be erected and maintained, and Her Majesty was to have all the rights of the said corporation as to the erection and maintenance of such fences as the said rights existed under the said lease of 1st January, 1859.

I think it clear that, under these circumstances, neither the defendant nor his predecessors in title, nor the plaintiff, until he obtained it, had any right of access to this road from what are now the plaintiff's lands, and that the university authorities had the right to prevent the plaintiff from having any such access.

There was no evidence upon which it could have been properly found that any predecessor in title of the plaintiff had made use of any access from what are now the plaintiff's lands to this road prior to the lease to the city of the 1st January, 1859, and such use thereafter, until the agreement of the 2nd of March, 1889, could not operate to create a right during that time against the reversioners, for during that time they could take no means to prevent such access being had: *Baxter v. Taylor* (1832), 4 B. & Ad. 72.

And it was only after the agreement of the 2nd of March, 1889, that the reversioners had power to prevent such access, and such access only began to operate to create a right from that date, and so no prescriptive right to such access was shewn.

It was contended, however, that the lease of the 1st January, 1859, was determined by the judgment declaring it to have been forfeited, and that the claim of a prescriptive right was entitled to prevail as it was not resisted within three years after such determination, but by the agreement of the 2nd March, 1889, this judgment was vacated and the action in which it was recovered was dismissed, and all the breaches of covenant in the said lease were waived, and the said lease as modified by the said agreement was declared to be and remain

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in full force and effect according to the terms, provisoes, and conditions thereof.

The learned trial Judge found, and I think rightly found, that there was no license from any proper authority to any predecessor in title of the plaintiff to use such access.

The only question remaining, therefore, is as to the right of the plaintiff to recover against the defendant upon his covenant and the amount recoverable.

The covenant is as follows: "And the said party of the first part for himself, his heirs, executors and administrators, covenants and agrees with the said party of the second part, his heirs and assigns, that he the said party of the first part will indemnify and save harmless the said party of the second part, his heirs and assigns, against the payment of any money and against all loss, costs, or damages he may be obliged to pay to secure access from any portion of the said lands to College street as to a public street, provided always that such access is to be subject to restrictions imposed by virtue of the agreement between the city of Toronto and the University of Toronto dated the 2nd day of March, A.D. 1889."

Now, this covenant assumes the want of access from any portion of the said lands to College street, and indemnifies and saves harmless the plaintiff against the payment of any money and against all loss, costs or damages he might be obliged to pay to secure such access, and in order to secure such access he was obliged to pay (or had to pay, which is an equivalent phrase) the sum of \$780, and it is not pretended that this was an unreasonable sum, and this sum he is plainly entitled to recover from the defendant, together with interest thereon, and I think that he is also entitled to recover the costs which he was put to, and which were held recoverable under the covenant by the learned trial Judge.

The appeal should, in my opinion, be dismissed with costs.

Appeal dismissed.

R. S. C.

[IN THE COURT OF APPEAL.]

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Oct. 8.

Limitation of Actions—Grant to Uses—Deed of Appointment—Intervening Adverse Possession.

The purchaser of land in 1870 had it conveyed by the vendor to grantees named by him to hold to such uses as the purchaser should by deed or will appoint, and in default of, and until, appointment to the use of the grantees. The purchaser put his mother in possession of the land, and she remained in possession till her death in 1878, her two daughters, the defendants, living with her, and they after her death continued in possession down to the time of the bringing of this action in 1897, no rent having been paid, nor any acknowledgment of title given. In 1892 the purchaser, in alleged exercise of the power, executed a deed of appointment in favour of his solicitor, who, on the following day, conveyed to him in fee simple. He died in 1894, having devised the land to the plaintiffs:—

Held, that the grantees to uses took an estate in fee simple which was barred before the execution of the deed of appointment, and that that deed did not give a new starting point to the statute, the estate appointed not being within the meaning of the statute, a future estate coming into existence at the time of the exercise of the power.

Judgment of a Divisional Court, 30 O.R. 504, reversed, BOYD, C., and STREET, J., dissenting.

AN appeal by the defendants from the judgment of a Divisional Court [Meredith, C.J., Rose, and MacMahon, JJ.] reported 30 O.R. 504, was argued before BOYD, C., OSLER, MACLENNAN, and LISTER, JJ.A., and STREET, J., on the 22nd and 24th of January, 1901.

Armour, K.C., and *H. W. Mickle*, for the appellants. The power of appointment is not an estate or interest within the meaning of the Limitations Act: Sugden on Powers, 8th ed., pp. 94, 104; Darby and Bosanquet on Limitations, 2nd ed., p. 683; *In re Earl of Devon's Settled Estates*, [1896] 2 Ch. 562. It cannot be denied that leaving out of view the power of appointment the estate of the original grantees would have been barred, and the fact that there was a power of appointment makes, it is submitted, no difference. As soon as the estate in fee simple was barred, all the incidents, including the power of appointment, were also barred. The power is a power to divest an estate from one person and to vest it in another. Before the power was exercised the estate itself was gone and there was nothing to divest from the one and to vest in the other. The original grantees took an estate in fee simple at common

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law, not under the Statute of Uses, and that estate having been barred there was no seizin to support the uses. This is quite clear in the case of escheat and forfeiture: 1 Sanders on Uses, pp. 57, 66, 108, 878; and the same principle ought to apply when the estate of the grantees to uses is lost under the Limitations Act. Section 28 of the Law and Transfer of Property Act, R.S.O. 1897, ch. 119, does not apply in this case. The English section of which this is a counterpart was passed to avoid the difficulty caused by the grant to the use of successive persons in fee, the first use, according to some conveyancers, exhausting the power. It does not refer to seizin in general but merely to the technical seizin to uses known as *scintilla juris*. There must still be a grantee to support the appointment: Sugden on Powers, 7th ed., p. 10; and 8th ed., pp. 19, 20; Leith's Real Property Statutes, pp. 16, 17; Armour on Real Property, p. 456. The section was not referred to in the *Earl of Devon's* case, and it is impossible to conceive that it could have been overlooked if applicable.

Aylesworth, K.C., and *E. W. Boyd*, for the respondents. Possession was held by consent and therefore the statute did not run at all. Even if, however, the possession is held to have been adverse the right of the present grantees has not been lost. An executory estate liable to arise at any time was reserved in the original conveyance, and even assuming that the original intermediate estate has been barred, it has been barred subject to the right of appointment, which gives rise to the new estate. Probably the right to enter would exist for ten years after the exercise of the power of appointment. It certainly would exist for five years, and even on that supposition the action is in time: *Pedder v. Hunt* (1887), 18 Q.B.D. 565. The case *In re Earl of Devon's Settled Estates*, [1896] 2 Ch. 562, applies. There is no ground for limiting the application of section 28 of the Law and Transfer of Property Act. That section is as wide as possible in its terms. The original seizin is all that is required, and continued seizin is expressly said not to be necessary: Hunter's Real Property Statutes, p. 70. At any rate there was no extinguishment of estate, but merely a bar to the right of possession, the legal estate remaining: R.S.O. 1897, ch. 133, sec. 15. There is no right to compensa-

tion for improvements. At the least, if compensation for improvements is allowed occupation rent should also be allowed, and that rent would more than wipe out the claim for compensation.

Armour, in reply.

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October 8. MACLENNAN, J.A.—The facts are simple and free from dispute. On the 25th of October, 1870, one Eyre Thuresson purchased the land in question for the sum of \$1,700 from one Joseph Robinson and his wife, and had the conveyance made to two other persons, Francis Digby Thuresson and Eyre Mortimer Thuresson. The conveyance is expressed to be made in pursuance of the Short Forms Act, and thereby the vendors in consideration of \$1,700 paid by the grantees do grant the land to them and their heirs, *habendum* to them (not saying *and their heirs*) to such uses as Eyre Thuresson shall by any deed or deeds or by his last will and testament appoint, and in default and until such appointment, and so far as any such appointment shall not extend, to the use of the said parties of the second part, the grantees, their heirs and assigns, for ever. Besides the acknowledgment in the body of the deed of the payment of the purchase money by the grantees, there is a receipt to the same effect indorsed and signed by the vendors. But it is admitted that the purchase was made by Eyre Thuresson and that the purchase money was paid by him.

Immediately after the completion of the purchase Eyre Thuresson put his mother in possession, and she and her two daughters, the present defendants, occupied from that time until the mother's death, on the 21st of July, 1878, except that the defendant Mrs. Foote had been absent some time during her mother's life time for about five years. The two defendants have been in possession ever since.

The defendant Emma Thuresson, therefore, has been in possession since 1870, and the defendant Mrs. Foote since the 21st of July, 1878, without any acknowledgment, interruption, or payment of rent. On the 1st of November, 1892, Eyre Thuresson, by deed in the usual form, appointed and conveyed the land unto and to the use of one E. W. Boyd, who, on the following day, reconveyed the same to Eyre Thuresson in fee.

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Eyre Thuresson died on the 15th of April, 1894, having devised the lands in question to the plaintiffs, whom he also appointed his executors. The present action was commenced on the 19th of May, 1897. The plaintiffs rely on the deed of appointment as giving a new starting point for the statute on the 1st of November, 1892; and the defendants, besides relying on the statute, claim judgment for improvements to the value of \$800 made by them in the belief of title. The learned Chief Justice at the trial thought that the title of the grantees having been barred at the end of the ten years, that is, either in 1880 or 1888, before the appointment, and while the fee was in the grantees, the title could not be revived by a subsequent appointment; and he dismissed the action.

This conveyance presents the question which was keenly debated in the early decades of the last century by two legal writers of great authority, namely, Sir Edward Sugden, afterwards Lord Chancellor St. Leonards, and Mr. Sanders, the author of the work on uses. The grant is to two persons and their heirs, to the use of the same persons and their heirs for ever, with a power of revocation and new appointment of uses reserved to Eyre Thuresson. Sir Edward Sugden was of opinion that in such a case the power was good, while Mr. Sanders maintained to the last, notwithstanding the reasoning of Sir Edward Sugden, that the power was void, because the seizin and the use being limited in fee to the same persons, there could be no further limitations of the use. See the discussion: 1 Sanders on Uses, 4th ed. (1824), p. 155 *et seq*; Sugden on Powers, 8th ed., pp. 140-146. See also 1 Hayes on Conveyancing (1840), p. 460. The question appears to have been decided in accordance with the view of Lord St. Leonards, in an unreported English case, referred to in his work, p. 144, which was followed in an Irish case: *Gorman v. Byrne* (1858), 8 Ir. C.L.R. 394.

The case was argued before us by the counsel both for the appellants and the respondent on the assumption that the power when created was good; and the appellants' contention was that not having been exercised until after the title of the grantees had been barred, the power was gone, and was not saved by anything in the Real Property Limitation Act.

The learned Judges below determined that the case was within sec. 5 (11) of the Limitation Act; and the Chief Justice was of opinion that the objection that the power was not exercised until after the title had been barred was overcome by sec. 28 of R.S.O. 1897, ch. 119. The Chief Justice seemed to doubt whether the case was within sub-sec. 1 of sec. 6 of the Limitation Act, but that if not sub-sec. 11 of sec. 5 was applicable.

I am not able to agree with the judgment. In my opinion, inasmuch as the statute had completely run while the fee simple was in the grantees, they were barred by the 4th section of the Act, and their estate, which was the whole fee simple in the land, was extinguished by sec. 15.

The applicability of sec. 6 (1) was strongly pressed before us; but the Chief Justice has pointed out the difficulty of so holding very clearly. In the passage from Preston cited by him, that great authority distinctly excludes determinable fees from the category of particular estates. I think it clear that the section is confined to the case where there has been an actual succession of estates, and is wholly inapplicable to the present case.

Then as to sub-sec. 11 of sec. 5, which is as follows: "Where the estate or interest claimed is an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession."

I think that when this sub-section is attentively considered it is apparent that it also is inapplicable. In the first place, it is dealing with estates which at one time were preceded by another or other estates, and were, therefore, at one time, future estates or interests, estates which for a time existed in interest only, and afterwards fell into possession. Remainders and reversions are mentioned as examples, and the other future estates or interests must be *ejusdem generis*. That such is the meaning is made more apparent by the last two lines, which speak of "the time at which *such estate or interest* became an estate or

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interest in possession." The estate created by the exercise of this power is the whole fee simple, and is either the same old estate which was in the grantees, or it is a new creation which never existed before, and therefore, in either view, never was a future estate, or anything else than an estate in possession.

The Chief Justice has, at p. 507, cited several cases in support of the position that before, and until, the power was exercised, the estate or interest which Eyre Thuresson might have appointed thereby, was a future estate, or interest, within the Act. I am unable to perceive that those cases support the proposition for which they are cited. They are all cases in which the future estate or interest had arisen before the statute had run. If Eyre Thuresson had exercised the power before the statute had run, and had limited a succession of estates, the estates in remainder or other future estates or interests so limited would be governed by sub-secs. 11 and 12; but that is not the present case. It was also contended that the power itself was a future interest within the section and became an interest in possession when it was executed. This contention has been adjudged otherwise in *In re Earl of Devon's Settled Estates*, [1896] 2 Ch. 562, where a power of appointment was held not to be an estate, interest, right, or possibility, within sec. 20 of 3 & 4 Wm. 4, ch. 27, corresponding with our sec. 6, sub-sec. 3. If not an estate or interest within that sub-section, no more can it be an estate or interest within sub-sec. 11.

Mr. Aylesworth cited the *Earl of Devon's* case in support of his contention that Eyre Thuresson could exercise the power and appoint the estate after it was barred. It is true that in that case the eleventh earl's life estate was barred a few months before his death, and the appointment, having been made by his will, took effect at his death, and after his life estate was barred. But the difference between that case and this is, that here the whole fee simple had been barred when the power was exercised, while there the life estate of the twelfth earl and the remainder in fee were still alive. It was accordingly held that the appointment was effectual, and that the appointees in remainder had six years to bring action after the death of the twelfth earl, under the section which corresponds to our sec. 6 (1).

I am unable to understand how, after the estate of the grantees had been barred, it could be revived by the exercise of the power, having regard to sec. 15 of the Act. That section declares that at the determination of the period limited to any person for bringing an action the *right and title of such person to the land* shall be extinguished. After that time had run in the present case, therefore, there was nothing on which the power could operate. There was no longer any title in existence but that of the defendants who were in possession. The title of the grantees consisted of two things: the seizin and the use. A power when exercised operates on the use, and the Statute of Uses operates on the seizin and attracts it to the use. But when the title is extinguished there is neither seizin nor use to be operated upon either by the power or by the statute. But it was argued that it was a defeasible fee, a fee capable of being defeated. But it was a fee nevertheless, and when the statute had run, both the use and the seizin which could have been shifted by the appointment and the Statute of Uses had been extinguished. Indeed it seems to me an absurdity to say that when the title in fee simple is extinguished it nevertheless still continues to exist, for the purpose of being transferred by appointment to a new owner.

The question remains whether the difficulty is removed by sec. 28 of R.S.O. 1897, ch. 119.

It is said that the enactment does away with the necessity of any title in the grantees under the deed when the power was exercised.

The object and purpose of this Act are explained by Lord St. Leonards, by whom the Act was originally carried through Parliament, in his book on powers, 8th ed., pp. 18, 19; and also in Williams on Real Property, 13th ed., p. 295. That purpose was to remove the objection, which had been mooted, and much discussed, in the case of shifting or springing or contingent uses, that where the legal seizin was exhausted for the purpose of one or more such uses the other uses limited by the same instruments could not take effect for want of seizin to support them. As in the present case, as already pointed out, the grant is to the two grantees and their heirs, to the use of

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them and their heirs, until appointment by Eyre Thuresson, etc., the seizin in the grantees is in fee, and the use limited to them is also in fee, and co-extensive with the seizin, and so there is no seizin left to support any uses which Eyre Thuresson might appoint. What the statute says is that the *seizin originally vested* in the person seized *to the uses* shall be sufficient for all the estates limited, and that is all. It was intended to remove, and all it does is to remove, the doubt which existed upon the construction and effect of conveyances to uses. It merely *declares* that the *seizin* of the person seized to uses in such a deed shall have a certain effect.

I am, therefore, of opinion that this section had no effect in keeping alive the power of appointment, after the title in fee simple was barred, and that the appeal should be allowed with costs to the defendants here and below.

OSLER, and LISTER, JJ.A., concurred.

BOYD, C.:—The modern rule applicable to the nice points of law discussed before us is succinctly stated in Jones on Uses, p. 73, thus: "Whenever a use was after any assurance operating by transmission of possession limited contingently—and such use was preceded by a prior vested use that was executed by the statute (of Uses) it was considered practically that no alteration in the seizin could defeat the effect of the contingent use should the event happen on which it was to arise."

That passage applies to the instrument of grant of the 25th of October, 1870, by which the land in question was granted to Francis D. Thuresson and Edward Mortimer Thuresson to hold to such uses as Eyre Thuresson might appoint, and in default of appointment to hold to the use of the grantees.

The legal estate in fee simple is vested in the grantees subject to be divested upon the exercise of the power of appointment. That is to say, the *absolute* vesting of the estate in the grantees is postponed in favour of the future possible appointment in fee simple. This appointment in fee simple was actually made by Eyre Thuresson in 1892 so that as between the appointee and the grantees the defeasible fee of

the latter was superseded by the *absolute* fee simple of the former arising by virtue of the exercised power.

So far as the old law respecting destruction or extinction of the use is concerned, there was no deforcement or intrusion on the part of the present defendants proved, even if it would avail in that way against the more modern doctrine respecting the operation of the Statute of Uses. This my brother Street has adverted to in his opinion, and I do not dwell on it. This modern doctrine is as well defined by Preston as by any other author; for it is singular that the conflict and discussion in the early cases have not resulted in any authoritative decision upon the precise point we have to deal with. The following extracts will show Preston's conclusions: "By some eminent lawyers it has been understood that the statute does not annex the legal title to any uses, till these uses give vested interests:" Preston on Estates, p. 156.

"The established practice of conveyancers negatives the construction that the estate is executed to the person only, and not to the use:" p. 157.

"The more rational opinion seems to be, that the statute passes the estate of the feoffees in the land, to the estates and interests in the use, and apports the estate in the land to the estates and interests in the use; and modifies the estates or interests in the use accordingly:" p. 165.

"The estate of the feoffees is confounded in the use [*i.e.*, confused or mixed up with] in whatever manner the use is limited:" p. 166.

"The construction of the statute will be that the estate is transferred to the *use*, and not to the *person*:" p. 169.

"Indeed, the most correct notion which may be formed is that the feoffees to uses make a conveyance to the person to whom, in the conveyance to the feoffees, the use is limited, whether these persons be *in esse* or *in posse*, and to whom it would result according to the rules of the courts of equity, in those instances in which there was not any present or effectual disposition of the use of the fee:" p. 173.

In conformity with this result are the conclusions of Lord St. Leonards (Sugden on Powers, 7th ed., pp. 16, 534) adopting the position of Chief Justice Wray in *Chudleigh's Case* (1589),

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1 Rep. 113 (b), but he says best reported in Anderson 309, and of Mr. Hayes, Introduction to Conveyancing, 5th ed., pp. 59 and 60.

Assuming this as the correct exposition of the statute it follows that the seizin is at once confirmed in all the uses present and future, and the power to appoint is in effect a contingent future use. Therefore, as already intimated, the first grantee would take a qualified fee simple subject to be divested, and by the appointment the absolute fee simple would vest in the appointee, represented by the plaintiff.

Upon the theory of the Statute of Uses, the contingent use or possible exercise of the power of appointment would be in the nature of a future interest in the land falling within that category of estates as provided for in the Statute of Limitations, R.S.O. 1897, ch. 133, sec. 5. Though a future right is not within the express terms of sec. 5, yet that section is not to be judicially considered as necessarily exhaustive in defining when the right of entry accrues: Cairns, L.C., in *Heath v. Pugh* (1882), 7 App. Cas., at p. 238; Thesiger, L.J., in *Governors of Magdalen Hospital v. Knotts* (1878), 8 Ch. D., at p. 727.

But if not falling within sec. 5 the right of entry vested in the appointee and exercisable by the plaintiff does fall within sec. 4. There is in this aspect a new right of action to recover possession arising on the appointment which vests the estate without entry. Ten years is given to prosecute that action against those in possession by sec. 4. The rule of construction is laid down by Tindal, C.J., in *James v. Salter* (1837), 3 Bing. N.C., at p. 533, that every case which falls plainly within the words of sec. 4 (but is not included amongst the instances given in the following sections) is to be governed by the 4th section.

Now, what is the effect of the Statute of Limitations upon the possession of the defendants? They entered at the instance of Eyre Thuresson after the execution of the deed of 1870, and no doubt, as against the first grantees, the length of undisturbed possession has ripened into a title. The exact effect of sec. 15 has to be considered which provides that the right and title of the person entitled to bring an action [for possession against

the occupants at the end of the period of limitation] shall be extinguished.

The title of the defendants is founded on possession, nothing more. As against the grantees, owners of the defeasible estate, the possession at first precarious ripened into an absolute estate as against them, but not as against any superior title. The outstanding estate which arose in law and fact upon the appointment was superior to the right of possession enjoyed by the defendants, which was at the highest only commensurate with the estate and title which the statute extinguished.

In favour of the defendants to hold that the title of the appointee was a nullity would to my mind merit the epithet applied in *Zouche v. Dalbiac* (1875), L.R. 10 Exch., at p. 181, that is, "monstrous."

No case is made for improvements unless the occupiers submit to be charged with occupation rent, and I suppose the one would nullify the other.

I would affirm with costs.

STREET, J. :—The lands in question were granted on the 25th of October, 1870, by Joseph Robinson, the owner in fee, to Francis Digby Thuresson and Eyre Mortimer Thuresson, their heirs and assigns for ever; *habendum* to the grantees to such uses as Eyre Thuresson should by any deed or deeds or by his last will and testament appoint, and in default of and until such appointment, and so far as any such appointment should not extend, to the use of the grantées, their heirs and assigns forever.

The effect of this conveyance was to vest the fee simple in the grantees subject to be divested by the exercise of the power of appointment by Eyre Thuresson at any time during his life. Immediately after the conveyance Eyre Thuresson, who had paid the purchase money for the property, put his mother in possession, with her two daughters, the present defendants, and although the mother has since died the two daughters succeeded to her possession and have held it down to the present time. It is not suggested that either Eyre Thuresson or his mother were trespassers in so dealing with the possession, and we must assume, I think, that Eyre Thuresson put his mother in posses-

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sion with the authority of the grantees in the deed. Neither she nor her daughters have ever paid rent or acknowledged the title of any person.

On the 1st of November, 1892, Eyre Thuresson executed the power of appointment contained in the conveyance of the 25th of October, 1870, by conveying and appointing the land in question to Edward W. Boyd in fee, and on the following day Boyd conveyed the same land to Eyre Thuresson in fee.

Eyre Thuresson died on the 15th of April, 1894, having devised all his land to the present plaintiffs, his executors, upon certain trusts set forth in his will. The writ herein was issued on the 19th of March, 1897.

The defendants claim title by length of possession. Apart from the question of the Statute of Limitations it is plain that the execution by Eyre Thuresson of the conveyance to Boyd under his power of appointment had the effect of determining and divesting the estate in fee of the grantees in the original conveyance and of vesting it in Boyd; and Boyd's estate took effect precisely in the same manner as if it had been limited to him by Robinson, the grantor of the power, in the deed from Robinson in which the power is created, but taking effect only from the time the power was executed, and not from the creation of the power: *Duke of Marlborough v. Lord Godolphin* (1750), 2 Ves. Sr. 61, at p. 78; Sugden on Powers, 8th ed., p. 470; *In re Earl of Devon's Settled Estates*, [1896] 2 Ch. 562, 567.

Reading into the deed of 1870 the estate limited to Boyd by Eyre Thuresson in the deed of 1892, and treating it as taking effect at that time, we have an estate created by the deed of 1870 which arises in 1892 and determines the estate in fee of the grantees in the deed of 1870. I can see no reason for excluding the estate which arose in 1892 under the deed of 1870 from the description of a "future estate or interest" found in the 11th and 12th sub-secs. of sec. 5, and the 1st sub-sec. of sec. 6 of R.S.O. 1897, ch. 133, and the authorities and text books seem to be uniform in favour of the view that an estate so created is to be deemed "a future estate or interest" within the meaning of the corresponding sections of the Imperial Acts from which our Act is taken: *James v. Salter*, 3 Bing. N.C. 544, 553; *Irish Land Commission v. Grant* (1884), 10 App.

Cas. 14, 27 ; *In re Earl of Devon's Settled Estates*, [1896] 2 Ch. 562 ; Shelford's Real Property Statutes, 9th ed., p. 122 ; Sugden's Real Property Statutes, p. 22.

It may be well to point out here that the deed of 1870 was made before the statute began to run in favour of the defendants and their mother, because it is in evidence, and admitted, that her possession began only when she was put in possession by Eyre Thuresson after the purchase from Robinson.

It is argued, however, that in 1892 the defendants had acquired an absolute title under the statute against the grantees in the deed of 1870, and that their title could not be divested by the execution of the power of appointment, because the seizin of those grantees was extinguished, and there was no virtue in the transfer of a mere use without a seizin to serve it.

This objection, I think, is not sustainable in the face of the 28th sec. of R.S.O. 1897, ch. 119, which enacts that "when by any instrument any hereditaments are limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, *or to be declared under any power therein contained*, shall take effect when and as they arise by force of and by relation to the estate and seizin originally vested in the person seized to the uses ; and the continued existence in him or elsewhere of any seizin to uses or *scintilla juris*, shall not be deemed necessary for the support of, or to give effect to, future or contingent or executory uses ; nor shall any such seizin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere."

The language of this section is too plain to permit us to hold, in the face of it, that uses declared under a power of appointment can not take effect unless a continued seizin is shewn to exist in the grantees to uses at the time the power is exercised. The supposed necessity for the existence of such a seizin under certain forms of limitation gave rise to the fiction of *scintilla juris*, and its existence or non-existence, and the necessity for it if non-existent, were fiercely debated until the whole controversy was set at rest in England by 23 & 24 Vict. ch. 38, sec. 7, from which our Act is taken. It was not, however, merely the technical question of *scintilla juris* which was

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settled by the Act, but the general one as to the necessity for continued existence of a seizin in a grantee to uses in order that uses declared in the settlement might take effect.

The power of appointment given by the deed of 1870 to Eyre Thuresson was one which by its terms was to be exercised by him during his life, and was unobjectionable therefore so far as its duration was concerned, and there is no Statute of Limitation which barred the exercise of it at the time at which it was executed. The estate in Boyd created by the exercise of the power was therefore, in my opinion, a future estate within the meaning of the statute and was validly created. The remaining question is as to whether the right to recover possession from the defendants under it has been barred by their length of possession.

In my opinion the title of the present plaintiffs has not been barred by the possession of the defendants, because ten years has not elapsed from the time the right to bring an action to recover the land first accrued to Boyd through whom they claim. That right only accrued to Boyd on the 1st of November, 1892, upon the execution by Eyre Thuresson of his power of appointment, which had the effect of determining the existing estate of the grantees in the deed of 1870 and brought the estate now claimed by the plaintiffs into being as an estate entitling Boyd to possession: R.S.O. 1897, ch. 133, sec. 5, sub-sec. 11.

I agree with the judgment of the Chief Justice in the Court below also in thinking that the 6th section of the Act, ch. 133, does not apply because a determinable fee is not properly within the description of a particular estate; if, however, that section could be held to apply, then the plaintiff is still entitled to succeed, his action having been brought within the period of five years from the time the estate of Boyd became vested in possession.

In my opinion the appeal should be dismissed with costs.

*Appeal allowed, BOYD, C.,
and STREET, J., dissenting.*

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[DIVISIONAL COURT.]

BROPHY V. ROYAL VICTORIA LIFE INSURANCE CO.

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Pleading—Statement of Claim—Striking out—Cause of Action—Embarrassment—Demurrer—Amendment—Terms—Rules 259, 261, 298.

In an action to recover the amount of an insurance upon the life of another person under a policy issued by the defendants and assigned to the plaintiff, the plaintiff alleged, in the alternative, that the defendants had reinsured with another company, and after the death of the insured the defendants requested the reinsuring company to pay the amount reinsured to the defendants, which the reinsuring company did, with a direction to pay the amount over to the plaintiff, which the defendants refused to do:—

Held, that this amounted to an allegation that the defendants had received a sum of money to the use of the plaintiff, which they refused to pay over to him, and that they were trustees thereof for him; and the paragraphs of the statement of claim containing the alternative allegations should not be struck out summarily under Rule 261 as disclosing no reasonable cause of action, nor under Rule 298 as tending to prejudice, embarrass, or delay the fair trial of the action.

Rule 261 is intended to apply only where the pleading is obviously bad. A party may still have a point of law disposed of, although he is not at liberty to demur: Rule 259.

Attorney-General of the Duchy of Lancaster v. London and North Western R.W. Co., [1892] 3 Ch. 274, and *Kellaway v. Bury* (1892), 66 L.T.N.S. 599, followed.

APPLICATION by the defendants for an order striking out paragraphs 11, 12, 13, and 14 of the statement of claim.

In the first ten paragraphs of the statement of claim the plaintiff alleged that he was the assignee of a policy of insurance issued by the defendants upon the life of one Alexander Cromar, deceased, for the sum of \$5,997, and that he was entitled by the terms of the policy to recover that amount from the defendants.

The paragraphs objected to were, in substance, as follows:—

11. The plaintiff alleges in the alternative that, subsequently to the defendants receiving from Cromar the application for insurance, they caused the risk to be assumed by another life insurance company, which company, in consideration of the application and payments made by the defendants to them, agreed with the defendants to pay to them the sum of \$5,997 whenever the same became payable by the defendants.

12. After the death of Cromar, and upon receiving satisfactory proof thereof, the defendants demanded from the

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re-insuring company payment of the sum due under the agreement.

13. The re-insuring company, shortly after receiving such demand, paid to the defendants under the agreement the \$5,997 for the purpose of the defendants paying the same to the plaintiff in satisfaction of his claim under the policy, and to which moneys the plaintiff was entitled by virtue of the assignment of the policy to him, and the re-insuring company, at the time of the said payment, instructed the defendants to so pay and apply the said moneys in satisfaction of the plaintiff's claim.

14. Notwithstanding that the defendants have received from the re-insuring company the said sum of \$5,997 for the purpose of paying the same to the plaintiff, they have willfully and wrongfully converted the whole of the said moneys to their own use, and still retain the same in their hands, though frequently requested by the plaintiff to pay the same to him.

The application was referred to a Judge by the Master in Chambers, and was heard by STREET, J., in Chambers, who, on the 28th October, 1901, made an order striking out the paragraphs objected to, and further providing that the plaintiff should be at liberty to apply, at any time within three weeks, for leave to amend the statement of claim, "the said application to be supported by evidence shewing *prima facie* the truth of the proposed amendments."

The plaintiff appealed from the order of STREET, J., and his appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and LOUNT, JJ., on the 13th November, 1901.

Daniel O'Connell, for the plaintiff. The paragraphs in question in effect allege that the defendants had and received money for the benefit of the plaintiff or in trust for the plaintiff: *Lawrence v. Fox* (1859), 20 N.Y. 268; *Tenant v. Elliott* (1797), 1 B. & P. 296; *Farmer v. Russell* (1798), *ib.* 296; *Thomson v. Thomson* (1802), 7 Ves. 470; *Merritt v. Millard* (1868), 4 Keyes (N.Y.) 208; *In re Batthyany* (1884), 32 W.R. 379. The Rules do not warrant striking out such a claim: *Attorney-General of the Duchy of Lancaster v. London*

and *North Western R. W. Co.*, [1892] 3 Ch. 274, 277; *Shafte v. Bolckow* (1887), 34 Ch. D. 725; *Kellaway v. Bury* (1892), 66 L.T.N.S. 599, 602; *Christie v. Ion Specialty Co.* (1898), 18 C.L.T. Occ. N. 85.

E. Martin, K.C., for the defendants. The paragraphs do not state what it is now argued they mean. Let the plaintiff put it in his pleading as a trust or as money had and received, if he chooses; it should not be left at large. The defendants should know what they are going down to try. They do not object to an amendment, and the plaintiff has the right to amend under the order appealed against. I refer to *Brock v. Tew* (1897), 18 P.R. 30; *Lawry v. Tuckett-Lawry* (1901), 2 O.L.R. 162.

November 15. MACMAHON, J.:—The appeal was from an order of Mr. Justice Street striking out paragraphs 11, 12, 13, and 14 of the statement of claim in an action brought by the assignee of one Alexander Cromar of a policy of insurance effected on his life. The statement of claim is somewhat lengthy, but the gist of the action is this: that the defendants re-insured with another company, and, although they refused to pay on their own policy, it is alleged that the re-insuring company paid to the defendants a sum of over \$5,000, to be paid over to the plaintiff.

The paragraphs mentioned must have been struck out either under Rule 261, which provides that any pleading may be struck out which discloses no real cause of action or is frivolous and vexatious, or under Rule 298, which provides that pleadings may be struck out which are scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action.

During the argument it was not contended that the pleading was either frivolous or vexatious, within Rule 261, nor was it contended that the pleading was in any way scandalous under Rule 298, so that it would have to be because the paragraphs struck out disclosed no real cause of action or that they tended to prejudice or embarrass the trial of the action.

As I have already said, the 14th paragraph discloses what the plaintiff's claim is, and says that, notwithstanding that the

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defendants have received from the said company the said insurance moneys amounting to \$5,997, for the purpose of paying the same to the plaintiff, they have wrongfully converted the said moneys to their own use and still retain the same in their hands, although frequently requested by the plaintiff to pay the same, which is simply an allegation that the defendants have received that sum from the re-insuring company to the use of the plaintiff and refuse to pay it over to him, and we think that a sufficient allegation that, if the moneys were so received, the defendants were trustees for the plaintiff.

In the 11th, 12th, and 13th paragraphs, the plaintiff merely sets out what the transaction was between the plaintiff and the defendants, and alleges therein that the defendant company re-insured, and after the death of Cromar it made a request upon the re-insuring company to pay the amount so re-insured to the defendants, and that the re-insuring company paid over the money with a direction to pay the same to the plaintiff. This cannot in any way prejudice or embarrass the fair trial of the action, although it may possibly embarrass the plaintiff should he attempt to prove some of the allegations therein.

Some portions of the paragraphs complained of and struck out perhaps might have been held bad on demurrer; but, as pointed out by the Court of Appeal in England, in *Attorney-General of the Duchy of Lancaster v. London and North Western R. W. Co.*, [1892] 3 Ch. 274, the applications under Order XXV., r. 4 (which is the same as our Rule 261), to strike out pleadings or stay proceedings on the ground that the pleadings disclose no reasonable cause of action or defence, are not intended to supply the place of demurrers, except in frivolous cases, and the Court will not entertain such an application if the pleading raises an important point of law. Like observations were made by Mr. Justice Lindley in the case of *Kellaway v. Bury*, 66 L.T.N.S. 599, 602.

Beyond the objection that there is no express averment of a trust being created in the plaintiff's favour, it was not complained that these paragraphs did not contain all the allegations necessary to shew a cause of action.

I think that the paragraphs should not have been struck out, and that the order made must be reversed.

LOUNT, J.:—I agree in the judgment of my learned brother.

MEREDITH, C.J.:—I did not sit during the whole argument. As far as I have been able to consider the case, I entirely concur in the conclusions to which my learned brothers have come, and I think it right just to add that I think that too often there is a tendency to apply the provisions of the Rule which has been applied in this case where it was never intended that it should be applied. It is a very serious thing, upon an interlocutory application, to strike out the whole statement of claim or to strike out a part of it which discloses or is intended to disclose a substantive cause of action, and the cases clearly shew that the Rule was intended to apply only where the pleading is obviously bad, and that where it is a pleading as to which before it can be determined that it is bad discussion is necessary, the Rule does not apply.

The other party is not without a remedy, because under the Rule (259) which makes the provision which takes the place of the demurrer under the old system, a party in the position of the defendants in this case is at liberty to raise the question of law upon the pleadings, and by leave of the Court before the trial of the action have it disposed of, and so avoid the expense of going down to trial.

The result is that the appeal is allowed and the order appealed from is reversed, and the costs here and below will be to the party successful in the action.

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Meredith, C.J.

[DIVISIONAL COURT.]

McNULTY V. MORRIS.

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Nov. 26.

Medicine and Surgery—Malpractice—Questions for Jury.

In an action against a surgeon for malpractice, the plaintiff has the right to a decision by a jury of a fact in controversy—not where that decision involves the consideration of difficult questions in the region of scientific inquiry, but where the fact to be found is as to what actually took place in the history of the plaintiff's malady and the defendant's treatment, *e.g.*, where there is a conflict of testimony as to what the surgeon did or did not do in the process of reducing or attempting to reduce a fracture. *Jackson v. Hyde* (1869), 28 U.C.R. 294, explained.

THE action was brought by a labourer who had his leg broken in a brickyard at the village of Delaware, by a mass of clay falling on it, to recover damages for malpractice against Charles E. Morris, the surgeon who set the leg, and who attended the plaintiff from the 1st September, 1899, the day of the accident, until the 18th September, 1899, when the plaintiff was moved from Delaware to his home at Melbourne, a few miles away. There was an oblique fracture of the tibia, and also a fracture of the small bone of the leg. There was no doubt that the plaintiff's leg was not right; there was an over-riding of the bone.

The action was tried before Robertson, J., and a jury at London. At the conclusion of the plaintiff's case a nonsuit was moved for, but the motion was allowed to stand till the conclusion of the whole case, when the Judge withdrew it from the jury, and dismissed the action.

The plaintiff moved for a new trial, upon the ground that there were questions of fact, depending upon conflicting evidence, which should have been submitted to the jury, *e.g.* :—(1) Was the fracture ever reduced? (2) What was the subsequent treatment: was tape measurement applied and was the proper splint applied? (3) Was the defendant relieved from the charge of the case?

The motion was heard by a Divisional Court composed of MEREDITH, C.J.C.P., and FALCONBRIDGE, C.J.K.B., on the 8th October, 1901.

J. O. Dromgole and *J. C. Elliott*, for the plaintiff. We say the fracture was never reduced; the defendant allowed it to override by improper treatment. Over and above any question of difference of opinion in the surgeons called as witnesses, there are questions of fact which should be submitted to the jury: *Kempffer v. Conerty*,* not reported. [They were stopped by the Court.]

I. F. Hellmuth, for the defendant. It is a matter of opinion whether the fracture was or was not reduced. Malpractice or no malpractice is so much a matter of opinion that the action is quite different from an ordinary action of negligence. As to the question whether the defendant was relieved from attendance, the onus is upon the plaintiff, because he had removed himself from the district in which the defendant practised. The defendant told the plaintiff that he was too busy to attend him at Melbourne, after his removal there, and it was arranged between them that Dr. James should open the splint, which he did on the 23rd September, and it was then that the difficulty arose. The negligence charged is, that the defendant did not adopt the proper course to reduce the fracture. The nonsuit is clearly right on the authorities: *Jackson v. Hyde* (1869), 28 U.C.R. 294; *Fields v. Rutherford* (1878), 29 C.P. 113; both approved in *Laughlin v. Harvey* (1897), 24 A.R. 438; *Myers v. Holborn* (1895), 30 L.R.A. (N.J.) 345; *VanMere v. Farewell* (1886), 12 O.R. 285, 292.

D. W. Saunders, on the same side. The physician is not an insurer; he does not contract to be versed in the very latest surgical science; he must be reasonably skilful only. The plaintiff cannot succeed by shewing that one mode of treatment has not been adopted. If it is a matter of opinion whether the proper course of treatment was adopted, we are entitled to have the principle of *Jackson v. Hyde* applied.

Dromgole and *Elliott*, in reply. It is not a matter of opinion. The conflicting evidence is as to matters of fact in regard to the state of the leg. [They then discussed the evidence.]

November 26. The judgment of the Court was delivered by FALCONBRIDGE, C.J.:—The attention of the learned trial

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Judge does not appear to have been called to the decision in *Kempffer v. Conerty*,* a somewhat important case which I do not find to have been reported, but which, I think, explains the rule laid down in *Jackson v. Hyde*, 28 U.C.R. 294, and cases following it. The result is, that a plaintiff has the right to a decision by a jury of a fact in controversy—not where that decision involves the consideration of difficult questions in the region of scientific inquiry, but where the fact to be found is as to what actually took place in the history of the plaintiff's malady and the defendant's treatment, *e.g.*, where there is a conflict of testimony as to what the surgeon did or did not do in the process of reducing or attempting to reduce a fracture.

* *Kempffer v. Conerty* was an action against a surgeon for alleged malpractice in setting and bandaging a broken hand of the infant plaintiff, whereby he permanently lost the use of his thumb. FERGUSON, J., before whom and a jury the action was tried, considered himself bound by *Jackson v. Hyde*, 28 U.C.R. 294, and *Fields v. Rutherford*, 29 C.P. 113, and at the close of the evidence withdrew the case from the jury. A motion for a new trial was made on the 15th September, 1899, before a Divisional Court composed of ARMOUR, C.J.Q.B., and STREET, J., by G. H. Watson, Q.C., for the plaintiffs, and opposed by B. B. Osler, Q.C., for the defendant. October 23, 1899. The judgment of the Court was delivered by ARMOUR, C.J.:—In my opinion this case ought not to have been withdrawn from the jury, for there were disputed questions of fact without the determination of which by the jury, it could not be held that the defendant was free from liability. It seemed to be conceded that the sore on the infant's hand had its inception from pressure of some sort, and a disputed fact was, whether such pressure was caused by his fall from the tree or by the splint used by the defendant and his mode of applying it; and this disputed fact involved the further disputed fact whether the splint used by the defendant was of the size described by the witnesses for the plaintiffs or of the size described by the defendant. And the most important disputed fact was, whether the method of bandaging the infant's hand adopted by the defendant was that deposed to by the plaintiffs' witnesses or that deposed to by the defendant; for the evidence was overwhelming, including that of the defendant himself, that if the method of bandaging the infant's hand adopted by the defendant was that described by the plaintiffs' witnesses, whether the infant's hand was bruised in his fall from the tree or not, such method was not consistent with ordinary care and skill. There must, therefore, be a new trial, and the costs of the last trial and of this motion must be paid by the defendant.

An appeal by the defendant from the order of the Divisional Court was argued before the Court of Appeal (BOYD, C., OSLER, MOSS, LISTER, J.J.A., and MACMAHON, J.), on the 8th January, 1901, by A. B. Aylesworth, Q.C., for the appellant, and G. H. Watson, Q.C., for the plaintiff. The Court gave judgment (orally) on the following day affirming the order of the Divisional Court, and expressing the opinion that the new trial should be before a Judge without a jury, but did not fetter the trial Judge in that respect.

And, with deference, it seems to me that in the present case there were facts in dispute as to which the plaintiff was entitled to the jury's findings.

For example, there was conflict of evidence as to what the treatment actually was in at least two particulars, viz., whether the defendant had used tape measurement to ascertain whether the fracture had been reduced, and (2) how far up on the leg the first splint extended.

It was also matter of dispute on the testimony whether the defendant had, at a certain stage of the treatment, been discharged or relieved from further attendance by the plaintiff, and another surgeon called in to take charge.

The question whether a certain tendon was at the time of the trial lying between the fractured portions of the bone seems to have been rather an ordinary question of fact and of credibility of witnesses than of scientific opinion.

And there are obvious subsidiary questions dependent on the way in which the jury might determine those already suggested, *e.g.*, when the overreaching or overriding of the bone commenced.

I am of the opinion that there must be a new trial—costs of the last trial and of this motion to be costs to the plaintiff in any event.

I was informed that the Court of Appeal, or some of the Judges thereof, intimated that *Kempffer v. Conerty* was a case proper to be tried by a Judge, and the present case seems to be of the same character, but this judgment is not intended to fetter the discretion of the trial Judge in this regard.

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[IN CHAMBERS.]

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Nov. 11.

Will—Construction—Devise—Charge of Debts and Legacies—Bequest of Rents—Estate in Land—Rule in Shelley's Case—Bequest of Proceeds of Sale—Principal and Interest—Administration Expenses—Apportionment.

A testator devised land to his son, and in his will directed the son to pay debts and legacies:—

Held, that the effect of this was to charge the payment of both debts and legacies upon the land devised.

Robson v. Jardine (1875), 22 Gr. 420, followed.

McMillan v. McMillan (1874), 21 Gr. 594, distinguished.

The testator by his will gave a house and lot to his daughter, but by a codicil purported to revoke the gift, and directed as follows:—"I will that the said house and lot be held by my daughter . . . who shall receive all rents and benefits therefrom during her natural life, and at her decease that all rents shall be invested for the benefit of her heirs on their coming of age:—"

Held, that by the rule in Shelley's case the daughter took an estate in fee simple in the lands.

VanGrutten v. Foxwell, [1897] A.C. 658, and *Verulam v. Bathurst* (1843), 13 Sim. 374, followed.

With reference to another parcel of land the codicil directed that all rents derived from it were to be divided between the testator's wife and daughter equally, and that on the death of a life-tenant the property should be sold and one-half the proceeds given to his wife or her heirs, and the other half invested, the principal for the benefit of the heirs of his daughter, and interest to go to his daughter during her life:—

Held, that as to one-half of this land also, the daughter took an estate in fee simple.

The testator did not provide for the payment of administration expenses, though he directed that his debts and funeral expenses should be paid by his son:—

Held, that the estate as a whole should defray the expenses of administration, and if there was a different disposition of the real and personal parts, there should be a ratable apportionment according to the respective values of the real and personal estate.

AN application under Rule 938 by Anne M. Dirrim (formerly Thomas), widow of Edward Thomas, deceased, and Charlotte Isabella Fell, a daughter of Edward Thomas, they being two of the devisees and legatees under his will, for an order determining certain questions raised as to the proper construction of that will.

The testator died on the 22nd July, 1893. By his will, dated the 14th May, 1892, he gave and bequeathed to his son, William Edward Thomas, "that portion of my real estate as follows, and all moneys on hand, and money owing to me, mortgages, notes of hand, book accounts, and all the stock and implements on the farm, at the time of my decease." He then

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described the real estate which he gave to his son, namely, his "homestead in Brant's block," "a piece of land lying in the township of Nelson" (lot 17), "a parcel of land lying in the township of Nelson" (lot 18), and two other parcels. He then gave and bequeathed to his wife lot 2 in block A. in the township of Nelson, and continued: "And I will that within one year after my decease, that my son William Edward Thomas shall cause to be erected a brick dwelling-house at a cost of not less than \$1,200, said dwelling-house to be erected on lot number 2 in block A. . . . I also will that my son William Edward Thomas shall pay to my wife . . . the sum of \$200 when the aforesaid house is completed. I also give and bequeath to my beloved wife . . . the sum of \$150 every year during her natural life, said sum to be paid by my son William Edward Thomas in half-yearly payments, the first payment to be made one year after my decease. Be it understood that all bequests made to my wife . . . are in lieu of her dower, and should she choose to claim her dower, these bequests to her shall be null and void." He then gave and bequeathed to his daughter Charlotte Isabella Fell a house and lot in the village of Burlington, and continued: "I further will that my son William Edward Thomas do pay to my daughter Charlotte Isabella Fell the sum of \$100, said payment to be made two years after my decease." He then directed that his household furniture and certain other chattels should be divided equally between his wife and son, and that his funeral expenses and his debts should be paid by his son. And he appointed his wife, his son, and one George Sovereign executors.

By a codicil, dated the 1st July, 1893, the testator revoked the gift of one of the parcels of land to his son, and gave "that parcel to my wife and daughter as follows: (a) All rents derived from said property are to be divided between them equally. (b) On the decease of one John Dean . . . who holds a life lease on the said lands the property shall be sold, and of the proceeds of the sale of said lands one-half shall be given to my wife . . . or her heirs, and the other half shall be invested, the principal for the benefit of the heirs of my daughter . . . and interest shall go to my daughter . . . during her life.

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(c) But it is provided that all the timber on the said property . . . shall belong to my son . . . for his exclusive use and benefit, and that said timber shall be removed from said lands within ten years after the death of the said John Dean."

By the same codicil the testator revoked the gift of another parcel of land to his son and did "will and bequeath" it to his wife "for her exclusive use and benefit."

By the same codicil the testator revoked the gift to his daughter of the house and lot in Burlington, and continued: "And by this codicil I will that the said house and lot be held by my daughter Charlotte Isabella Fell, who shall receive all rents and benefits therefrom during her natural life, and at her decease that all rents shall be invested for the benefit of her heirs on their coming of age."

Probate of the will and codicil were granted to the executors named on the 11th October, 1893.

The following questions were raised upon the motion:—

1. Should the costs of administering the estate be borne by the son, or by the widow, daughter, and son in proportion to benefits received under the will?

2. Should the cost of selling the parcel of land in which John Dean had a life estate be paid out of the proceeds of the sale, or should such costs be considered as part of the general costs of the administration?

3. What estate does Charlotte Isabella Fell take in the house and lot in the village of Burlington?

4. Does William Edward Thomas take the real estate devised to him in the will in fee simple and free from any charges of annuity?

5. What interest does Charlotte Isabella Fell take in the proceeds of the sale of the parcel in which John Dean had a life estate, and what disposition is to be made of such moneys at her decease?

The motion was heard by BOYD, C., in Chambers, on the 4th November, 1901.

J. W. Elliott, for Anne M. Dirrim and Charlotte Isabella Fell, the applicants.

J. V. Teetzel, K.C., for William Edward Thomas and George Sovereign.

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F. W. Harcourt, for the infant children of Charlotte Isabella Fell.

November 11. *BOYD, C.*:—By the will the testator's son W. E. Thomas is directed to pay the debts, and he is also directed to pay \$150 every year to the widow during her life. And the devise of the land of the testator is also made to the same son. The effect of this is, to charge the payment of both debts and legacies upon the land so devised to the son. He receives the fund out of which payment is to be made: *Robson v. Jardine* (1875), 22 Gr. 420, at pp. 424, 425.

It was a different question which arose on the pleadings in *McMillan v. McMillan* (1874), 21 Gr. 594, namely, whether upon sale of lands so charged a purchaser needed to see to the application of the purchase money—which is another matter altogether.

The testator gives a house and lot to be held by his daughter Charlotte, who shall receive all rents, etc., during her life, and at her decease all rents shall be invested for the benefit of her heirs on coming of age. "Rents" is equivalent to the use of an estate in the corpus, and the benefit is given in the same word "rents" both to mother and her heirs. That exhausts the whole property as designated by "rents," and the whole series of heirs taking in due course of succession, so that I think the rule in *Shelley's* case plainly applies to give the fee simple to the mother: *Van Grutten v. Foxwell*, [1897] A.C. 658, at p. 684, and *Verulam v. Bathurst* (1843), 13 Sim. 374, at p. 387.

The other devise is one which directs the sale of land after the expiry of a life lease and the donation of one-half to the wife, and the "other half shall be invested, the principal for the benefit of the heirs of my daughter Charlotte, and the interest to go to my daughter Charlotte during her life." Here the only point of distinction from the former gift is that the *interest* for life is distinguished from the *principal*; the whole fund being directed to be invested.

In the case in 13 Sim. the Vice-Chancellor (Shadwell) observes that some of the cases turn on the distinction of phrase

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where the *principal* is introduced as if it were contra-distinguished from the *interest*: p.387. I find such a distinction carried weight in some older cases such as *Smith v. Clever* (1687-8), 2 Vern. 38, 59: but even in 1786 Lord Thurlow said it was too late to argue upon the distinction of *principal* and *interest*, referring to *Butterfield v. Butterfield* (1748), 1 Ves. Sen. 133, 154, and *Daw v. Pitt* (1766), Fearne 347:* *Glover v. Strothoff* (1786), 2 Bro. C.C. 33, at p. 37. Fearne remarks that "as a devise of the rents and profits of land is tantamount to a devise of the land itself; so *pari ratione*, a devise of the dividends and payments of stocks and annuities, and of the use of furniture, seems equivalent to a like limitation of the stock, annuities or furniture themselves." Contingent Remainders, 10th ed., vol. 1, pp. 465-6. As to both, therefore, the mother, Charlotte, takes the absolute estate.

Another question submitted is as to the payment of administration expenses. The testator has not provided for the payment of these, but they are a necessary charge upon the whole estate, real and personal—particularly so since the Devolution of Estates Act. The estate as a whole should defray these charges and expenses, and if there is different disposition of the real and personal parts, then there should be ratable apportionment and distribution of the expenses according to the respective values of the real and personal estate. See *Patching v. Barnett* (1881), 45 L.T.N.S. 292, at p. 296, *per* Jessel, M.R.

After clearing off these and other proper liabilities, distribution of the residue is to be made according to the rights of the beneficiaries.

Costs of the application out of estate.

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* See *S.C., sub nom. Tothill v. Pitt*, 1 Madd. 488; *Earl of Chatham v. Daw Tothill* (1771), 6 Bro. Parl. Ca. 480.

[DIVISIONAL COURT.]

BENTLEY ET AL. V. MURPHY ET AL.

D. C.

1901

*Discovery—Examination of Plaintiffs—Specific Performance—Denial of Contract
—Tender—Financial Means—Pleading.*

Oct. 29.
Nov. 8.
Nov. 15.

In an action for the specific performance of an alleged contract for the sale and purchase of a vessel for \$5,000, one-half of which was to be paid in cash at the execution of the bill of sale and delivery of the vessel, and credit given for the remainder of the purchase money without any security upon the vessel or otherwise, the plaintiffs alleged a tender to the defendants of \$2,500 in payment of the down instalment. Defences in denial of the contract and of fraud were, among others, set up :—

Held, that, as the defendants absolutely refused to carry out the contract, and denied their obligation to do so, the question whether there had been a tender in fact was immaterial, in an equity action such as this ; and, therefore, the plaintiffs were not obliged upon examination for discovery to answer questions as to the source from which they had obtained the money alleged to have been tendered.

The defendants also sought to examine the plaintiffs as to their means to shew that they were persons of no means, which, it was contended, would be a circumstance to induce the court to refuse to adjudge specific performance, even if the contract were proved :—

Held, that the defendants were not entitled to such discovery, no such issue being raised upon the record, and it not being alleged that the contract was entered into upon the belief or representation that the plaintiffs were persons of means.

Certain parts of the statements of defence stating the plaintiffs' want of means and that the alleged tender was only a pretended one, were considered irrelevant, but were not struck out, because the plaintiffs had pleaded over.

MOTION by the defendants for an order dismissing the action or requiring the plaintiff Campbell to attend for re-examination for discovery and to answer certain questions which he refused to answer upon his original examination ; and cross-motion by the plaintiffs for an order striking out a portion of the statement of defence of the defendant Murphy. The facts are stated in the judgments.

The two motions were heard by Mr. Winchester, the Master in Chambers, on the 23rd October, 1901.

J. J. Foy, K.C., for the defendant Craig.

T. Mulvey, for the defendant Murphy.

A. M. Stewart, for the plaintiffs.

October 29. THE MASTER IN CHAMBERS :—This is an action for specific performance of an agreement by the defendants to sell to the plaintiff Bentley a certain vessel called "The

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Island Queen" for the sum of \$5,000. The defendants deny the contract, and say that the same was obtained through fraud and misrepresentation of the plaintiff Bentley. They also allege that the purchase money was to be paid in cash, or, if only part cash, the balance was to be secured by promissory notes indorsed by persons of such financial standing that the notes might be readily discounted in any chartered bank. They also deny that a sufficient tender of the purchase money was made; and in the 14th paragraph of the defendant Murphy's statement of defence he states: "The said defendant Murphy refused to carry out the alleged contract sued upon herein on the aforesaid construction thereof stated by the plaintiffs (namely, \$2,500 cash and \$2,500 on time without any security whatever) upon the grounds hereinbefore set out, as well as because he believed the said plaintiffs to be worthless, and if credit were given without security he would be at a loss to the extent of the amount unsecured." The defendant Craig in the 3rd paragraph of his statement of defence states: "No tender was made to the defendants, or either of them, of \$2,500, but a pretended tender was made to the defendant Murphy in order to lay a foundation for some claim against the defendants to extort money from them. The plaintiffs are men of no means, and, if the defendants had carried out what the plaintiffs seek, the defendants would be losers to the extent of \$2,500."

Upon the defendants examining the plaintiff Bentley for discovery, it was ascertained that he was merely acting as agent for one George H. Campbell, and accordingly George H. Campbell was added as a party plaintiff, and both plaintiffs were examined for discovery, but during such examination the plaintiff Campbell refused to answer all questions referring to where he obtained the \$2,500 alleged to have been tendered to the defendants for him, and as to what he did with it after receiving it back from his co-plaintiff. He also refused to answer any question respecting his financial ability to pay the \$2,500 balance of the purchase money unsecured.

The defendants thereupon served notice of motion for an order dismissing the action for refusal of the plaintiff Campbell to answer the questions referred to.

The plaintiffs at once served a notice of motion for an order striking out, as scandalous and as tending to prejudice, embarrass, and delay the fair trial of the action, that portion of the 14th paragraph of the defence of the defendant Murphy beginning with the words "as well as because" and continuing to the end of the paragraph; and also that portion of the 3rd paragraph of the statement of defence of the defendant Craig beginning with the words "in order to lay a foundation" and continuing to and including "\$2,500."

Dealing with the last-mentioned motion first, I am of opinion that the plaintiffs are not entitled to have the statements objected to struck out in Chambers. They have delivered a reply to such statements, and should go down to trial on the pleadings as closed. I do not consider it proper in Chambers to summarily deal with the defences in this specific performance action; the trial Judge may consider these defences on a question of costs, if on no other question in issue. I refuse the application.

Upon the pleadings, I am of opinion that the defendants are entitled to the fullest possible discovery, and, as that has been withheld from them, I direct the plaintiff Campbell to attend at his own expense and answer all proper questions respecting the matters in issue.

Costs to the defendants of the applications in any event of the action.

The plaintiffs appealed from the Master's order as to both applications, and their appeal was heard by BOYD, C., in Chambers, on the 4th November, 1901.

D. L. McCarthy, for the plaintiffs.

J. J. Foy, K.C., and *T. Mulvey*, for the defendants.

November 8. BOYD, C.:—Having pleaded over, I do not think that the application to strike out parts of the defence should be granted to the plaintiffs—though, but for that, I should think them at least irrelevant.

The issue is contract or no contract; and, if it be as the plaintiffs say, the fact that they have no means is not a defence. If the defendants chose to receive a down payment of \$2,500, giving credit for the balance, the Court will not interfere.

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There may be grounds for the Court withholding specific performance on the ground of misunderstanding as to the effect of the contract, or the condition of the defendant at the time the alleged contract was entered into, but the financial condition of the purchasers ought not now to be introduced, if no statement as to financial condition was made at the time of negotiations, which is not pretended. I do not think that discovery should be pursued by inquiry as to the lack of means of the plaintiffs.

Nor should there be investigation as to the source from which was derived the money tendered, or the disposition made of it after tender. *Ex concessis* the case does not turn on the tender, because the defendants will not take \$2,500 and carry out the contract as claimed by the plaintiffs. It appears to be altogether immaterial except as to costs—but, if the plaintiffs succeed, they should get costs whether the tender was made or not.

I do not think, therefore, that examination should be further prosecuted on these lines—but allow the pleadings to stand.

The case has already assumed portentous dimensions, and it had better be narrowed to material points.

The Master's order is changed, and all costs below and in appeal costs in cause to the plaintiffs, except as to motion to strike out—as to which no costs.

The defendants appealed from the order of the Chancellor in so far as it reversed the Master's order requiring the plaintiff Campbell to answer questions.

The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and LOUNT, JJ., on the 14th November, 1901.

J. J. Foy, K.C., and *T. Mulvey*, for the defendants, cited *Godwin v. Collins* (1868), 3 Delaware Ch. 189; *Willard v. Taylor* (1869), 8 Wall. (S.C.U.S.) 557; *Berrington v. Evans* (1835), 1 Y. & C. Ex. 434, 440; *Fry on Specific Performance*, 3rd ed., p. 439, sec. 592; *Bidder v. Bridges* (1884-5), 29 Ch. D. 29.

D. L. McCarthy, for the plaintiffs, referred to *Mansfield v. Childerhouse* (1876), 4 Ch. D. 82; *Bray on Discovery*, pp. 18, 300.

November 15. MEREDITH, C.J.:—This is an appeal from an order of the learned Chancellor made on the 8th November allowing an appeal from so much of an order of the Master in Chambers dated the 29th October as directed the plaintiff Campbell to attend for examination and answer certain questions.

The action is for specific performance of an alleged contract for the sale and purchase of a vessel for \$5,000, one-half of which was to be paid in cash when the bill of sale was to be executed and delivery of the vessel made, and credit was to be given for the remainder of the purchase money, without any security upon the vessel or otherwise being given.

A number of defences were set up: denial of contract, an allegation that the contract was induced by fraud, and some other defences to which it is not necessary to refer.

The plaintiff Campbell refused to answer questions directed to disclosing the source from which he had obtained the money which was alleged to have been tendered by the plaintiffs to the defendants in payment of the down instalment of the purchase money.

If the question of the tender had been a material issue, I think—and indeed there is nothing in the learned Chancellor's judgment to indicate that he thought otherwise—the question would be a proper one, because it might tend to obtain an admission which would result in shewing that the statement that the tender had been made was not true in fact; but in this case the defendants absolutely refuse to carry out the contract; they deny their obligation to carry it out: and therefore the question of tender at the time, in an equity action such as this is, is an immaterial issue. It was upon that ground that the learned Chancellor held that, as to the tender, the questions were not proper questions to be answered by the plaintiff Campbell.

Then it was argued that the defendants were entitled to discovery of the means of the plaintiffs, because it was alleged that they were men of no means, and that was a circumstance to be considered in connection with other circumstances to induce the Court to refuse, although the contract were proved, to adjudge the specific performance of it, leaving the purchaser

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to his remedy for damages for the non-performance of the contract. The answer which the learned Chancellor made to that contention seems to me to be conclusive: no such issue is raised upon the record; it is not alleged that the contract was entered into upon the belief or upon the representation that the purchasers were persons of means, and for all that appears upon the pleadings the defendants may have well known, when they made the contract, just what the circumstances of the plaintiffs were, as they now allege.

Therefore we adopt the view of the learned Chancellor that the discovery sought was not applicable to any issue raised upon the record, and that consequently the party proposed to be interrogated was not bound to answer the questions put to him which he declined to answer.

The result is that the appeal will be dismissed with costs to the respondents in any event.

MACMAHON and LOUNT, JJ., concurred.

E. B. B.

[IN CHAMBERS.]

RE ARNOLD CHEMICAL CO.

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Practice—Winding-up Act—Service of Petition—Time.

Nov. 8.

Under sec. 8 of the Winding-up Act, R.S.C. 1886 ch. 129, a petition was *held*, properly lodged, where notice of its presentation was given on the 4th for the 8th November.

NOTICE of the presentation of a petition under the Dominion statute for an order for the winding-up of the company was served on the company on the 4th November, 1901, and made returnable on the 8th November, 1901.

The petition was presented to BOYD, C., in Chambers, on the 8th November, 1901.

George Ross, for the company, objected that sec. 8 of the Winding-up Act, R.S.C. 1886 ch. 129, required four clear days' notice. The material words of the section are: "8. When a company becomes insolvent, a creditor . . . may, *after four days' notice* of the application to the company, apply by petition . . . for a winding-up order." He referred to Stroud's Judicial Dictionary, *sub verb.* "after" and the cases there cited.

James Bicknell, for the petitioning creditor, contended that the service was sufficient, citing *Boulton v. Ruttan* (1832), 2 O.S. 362; *Kerr v. Jeston* (1842), 1 Dowl. N.S. 538; *Blunt v. Heslop* (1838), 8 A. & E. 577; *Lester v. Garland* (1808), 15 Ves. 248; *Rex v. Justices of Cumberland* (1835), 4 N. & M. 378; *Williams v. Burgess* (1840), 12 A. & E. 635.

BOYD, C., reserved his decision on the point, but gave it later in the day. He was of opinion that the cases cited by counsel for the petitioner shewed that the notice was sufficient, and that the petition was properly lodged.

E. B. B.

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Dec. 4.

RE CHATHAM BANNER CO.

BANK OF MONTREAL'S CLAIM.

Banks and Banking—Bank Act, sec. 46—Inspection of Customer's Account—Evidence in Judicial Proceeding—Company—Manager—Private Liabilities—Winding-up—Position of Liquidator—Promissory Notes—Consideration—Impeaching—Account—Acknowledgment of Correctness.

Section 46 of the Bank Act, 1890, 53 Vict. ch. 31 (D.), providing that "no person, who is not a director, shall be allowed to inspect the account of any person dealing with the bank," does not enable a bank to refuse to disclose its transactions with one of its customers, when the propriety of those transactions is in question in a court of law between the bank and another customer who attacks them, and shews good cause for requiring the information he seeks.

The company had an account with the bank (claimant), and the manager of the company (who had power to sign notes for the company) had also an account at the same office of the bank. The claim of the bank against the company in winding-up proceedings included a number of promissory notes made by the manager and indorsed by the company. The liquidator shewed that notes so made and indorsed had been charged at maturity to the company's account by the direction of the manager, and that renewals of these notes formed part of the bank's claim:—

Held, that the liquidator, in examining the agent of the bank for the purpose of shewing that the original consideration for several of the notes included in the bank's claim was an advance to the manager for his own private purposes, and that the agent, knowing these notes to be the private debt of the manager, had, at his request, charged them to the company's account, was entitled to refer to the manager's own account with the bank, though the manager was not a party to the proceeding; more especially as the bank had set up certain transfers of cash from one account to the other as justifying them in charging the company's account with the manager's liabilities.

Held, also, that there was nothing to prevent the liquidator, who stood in the place of the company, from impeaching the consideration for the notes offered in proof by the bank, just as the company itself might have done, but no farther.

Held, also, that periodical acknowledgments given by the manager to the bank of the correctness of the company's account could not be set up as a bar to an inquiry into the account, where specific errors in it were charged, to the knowledge of the bank.

AN appeal by the liquidator of the Chatham Banner Company (Limited) from a certificate of the Master in Ordinary dated the 25th April, 1901, shewing that he had allowed the claim of the Bank of Montreal against the estate of the company in winding-up proceedings, in full, at \$1,335.36, and had also allowed the claimants their costs. The principal matters in question upon the appeal were, whether the ruling of the Master that the liquidator of the company was not at liberty to go into the private account of the manager of the company

with the bank, was right, and whether certain rulings against the liquidator's right to impeach the consideration of promissory notes making up part of the bank's claim, were right. The facts are stated in the judgment.

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The appeal was heard by a Divisional Court composed of STREET and BRITTON, JJ., on the 4th November, 1900.

G. H. Kilmer, for the liquidator. The manager of the company having kept his own account, as well as the company's, at the Bank of Montreal, and it having been shewn that some of the notes upon which the bank founded their claim were renewals of notes the proceeds of which had been placed to the credit of the manager's account and used by him for his own purposes, of which the bank had notice, and that from time to time the bank had charged to the company's account the amounts of notes and cheques given by the manager, the Master was wrong in ruling that the liquidator was not entitled to look at the manager's account in the books of the bank. The liquidator should be allowed to shew that some of the notes purporting to be made by the company were without consideration, to the knowledge of the bank. He referred to *Bridgewater Cheese Co. v. Murphy* (1895-6), 26 O.R. 327, 23 A.R. 66; *Creighton v. Halifax Banking Co.* (1890), 18 S.C.R. 140; *Gray v. Johnston* (1868), L.R. 3 H.L. 1, at p. 14; *Palmer's Company Law*, 2nd ed., pp. 120-122; *Williamson v. Barbour* (1877), 9 Ch. D. 529; *Gething v. Keighley* (1878), *ib.* 547; *Brice on Ultra Vires*, 3rd ed., pp. 221, 269.

A. B. Aylesworth, K.C., for the Bank of Montreal. The manager of the company had full authority to do all that was done in the name of the company, and there is no evidence whatever of any knowledge on the part of the bank that he had not authority to do exactly as he did. The discounts were all made in due course of business. The account of the manager with the bank was not examined because of the provisions of sec. 46 of the Bank Act; the liquidator declined to call the manager as a witness. *Bridgewater Cheese Co. v. Murphy*, 23 A.R. 66, is much in point.

December 4. The judgment of the Court was delivered by STREET, J.:—The insolvents, an incorporated publishing com-

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pany, carried on business at the city of Chatham, Ontario, and had a bank account in their own name at the agency there of the Bank of Montreal.

One N. F. Ford was the manager of the company, and also had a private account in his own name in the same agency of the Bank of Montreal. In October, 1896, the directors of the company passed a resolution, which was forwarded to the bank, that all bills, notes, acceptances, etc., must be signed by N. F. Ford, manager, in order to be binding upon the company. A large number of notes were from time to time discounted by the bank, the proceeds of some of them being placed to the credit of Ford and of others to the credit of the company.

The claim of the bank included a number of notes made by Ford and indorsed by the company. The liquidator shewed that a number of notes made by Ford and indorsed by the company had been charged at maturity to the company's account by the direction of Ford, and that renewals of these notes formed part of the claim of the bank. He was then in course of examining the manager of the bank for the purpose of shewing that the original consideration for several of the notes included in the claim of the bank was an advance to Ford for his own private purposes, and that the manager, knowing these notes to be the private debt of Ford, had, at his request, charged them to the account of the company. In order to do this, it was necessary to refer to Ford's own account with the bank, and the liquidator was proceeding to do this, when the Master in Ordinary interposed and said that the 46th section of the Banking Act of 1900 prohibited an investigation of Ford's account except in a case in which he was a party. Counsel for the bank then supported the objection taken by the Master, and the liquidator was not permitted to shew any of the deposits or withdrawals, or any entries whatever made in Ford's account, although attempts were repeatedly made by him to have the evidence allowed.

In this ruling, in my opinion, the learned Master in Ordinary was wrong. The section of the Banking Act referred to is one of the two sections found under the heading "Annual Statement and Inspection." The first of these two sections requires the directors to submit a full statement to the share-

holders of the affairs of the bank; and the second of them, with a view, probably, of leaving no doubt as to their right to have access to the sources from which they must obtain the information which they are to submit to the shareholders, provides as follows:—

“46. The books, correspondence, and funds of the bank shall at all times be subject to the inspection of the directors; *but no person who is not a director shall be allowed to inspect the account of any person dealing with the bank.*”

This section seems first to have been brought into the Banking Acts as sec. 37 of ch. 5 of 34 Vict., being the Bank Act of 1871, and the intention of the clause I have underlined probably was to do away with the right which a shareholder in the bank, as a *quasi*-partner, might possibly have asserted of inspecting the accounts of the banking company. But, whatever its intention may have been, it certainly cannot enable the bank to refuse to disclose its transactions with one of its customers, when the propriety of those transactions is in question in a court of law between the bank and another customer who attacks them, and shews good cause for requiring the information he seeks. In the present case there is this further ground for the liquidator's right to inspect the bank's accounts with Ford, that the bank set up certain transfers of cash from one account to the other as justifying them in charging the company's account with Ford's own liabilities, and this defence could not be met without an inspection of both accounts. I have no doubt, then, that the liquidator is entitled to a production of Ford's account with the bank and to the documents and information necessary to explain the entries found in it so far as they bear on the claim of the bank against the liquidator.

With regard to the other questions raised on the appeal, it appears necessary, having regard to certain rulings made in the course of the inquiry before the Master, to point out that there is nothing to prevent the liquidator, who stands in the place of the company, from impeaching the consideration for the notes offered in proof by the bank, just as the company itself might have done, but no farther. *Primâ facie* the notes are evidence of a liability for their amount from the company to the bank,

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but this *prima facie* case may of course be impeached by shewing defects to the knowledge of the bank in the consideration for the notes upon which they claim, in which event it may be necessary for the bank to shew that the state of accounts between the company and Ford is such as to support them in claiming the full amounts represented by the notes.

If, for example, the liquidator should succeed in shewing that Ford borrowed from the bank \$300 upon his note, to pay a private liability, and that the bank, at the maturity of this note, charged it, at Ford's request, to the company's account, and then discounted a note of the company's to cover the amount so charged, and that the last mentioned note were one of those proved on, a *prima facie* case would be made out for reducing the claim of the bank by the \$300. But the bank might shew facts which would rebut the *prima facie* case of the liquidator, as, for example, dealings between Ford and the company by which the company received consideration from him entitling him to charge his note to their account.

The liquidator has not been permitted to produce the evidence to which he is entitled for the purpose of investigating the bank's claim, and the matter must, therefore, be referred back to the Master in Ordinary for fuller investigation, and with the declaration that the liquidator is entitled for the purpose of it to the evidence afforded by the books and papers in possession of the bank. The bank should pay the costs of the appeal.

I should add that the periodical acknowledgments given by Ford to the bank of the correctness of the company's account, as set forth in his bank book, cannot be set up as a bar to an inquiry into the account, where specific errors in it are charged, as here, to the knowledge of the bank.

I have referred to *Ex p. Darlington, etc., Banking Co.—In re Riches* (1865), 4 D. J. & S. 581; *Gray v. Johnston*, L.R. 3 H.L. 1; *Creighton v. Halifax Banking Co.*, 18 S.C.R. 140; *Bridgewater Cheese Co. v. Murphy*, 23 A.R. 66; *Williamson v. Barbour*, 9 Ch. D. 529.

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[DIVISIONAL COURT.]

RE CANADIAN CAMERA AND OPTICAL CO.

A. R. WILLIAMS CO.'S CLAIM.

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Dec. 4.

Company—Winding-up—Claim against Assets—Lien on Goods Sold—Rights of Liquidator—Conditional Sales Act—Bills of Sale Act.

The claimants sold the company a machine upon an order signed by the company, the conditions of which were that the company should pay a part of the price in cash and the balance in instalments, with interest on such instalments payable with the last of them, and that the title should not pass to the company until the moneys payable by them under the order, as well as under any other orders which might be given by the company to the claimants, should be paid. At the time of the commencement of the winding-up of the company one instalment, the interest, and a further sum for goods ordered after the first order, remained unpaid. The liquidator came into possession of the machine, and sold it, subject to an alleged lien in favour of the claimants for the amount of the unpaid instalment only :—

Held, that the rights of the claimants under the contract still existed, and were not affected by the Bills of Sale and Chattel Mortgage Act nor by the Act respecting Conditional Sales of Chattels, nor by the liquidator's sale, and they were entitled to recover the full amount due under the terms of the order, out of the estate.

AN appeal by the claimants, the A. R. Williams Company, Limited, against a decision of the Master in Ordinary upon a claim of theirs upon the insolvent estate of the Canadian Camera and Optical Company, Limited, in winding-up proceedings before him.

The facts were undisputed, and were set forth in a special case agreed on between the parties, and may be shortly stated as follows:—

On the 7th May, 1900, the claimants delivered to the insolvents a turret lathe, upon an order signed by the insolvents, the conditions of which were, that the insolvents should pay \$120.56 cash, \$120.56 in two months, \$120.56 in four months, and \$120.56 in six months, with seven per cent. interest on the last three sums, payable with the last of them; that the title should not pass to the insolvents until the moneys payable by them under the order in question, as well as under any other orders which might be given by the insolvents to the claimants, before the lathe were fully paid for, should be paid.

After the date of the order in question, the insolvents ordered and received other goods from the claimants, amount-

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ing in all to \$134.89. The insolvents paid the first three sums of \$120.56 each mentioned in the order in question, but, at the time of the commencement of the winding-up, the remaining instalment of \$120.56, and the interest amounting to \$11.15, and the sum of \$134.89 for the goods ordered after the order in question, remained, and at the time of the appeal still remained, unpaid.

After the beginning of the winding-up proceedings the liquidator came into possession of the lathe in question, and offered it with other assets of the estate for sale by tender, the lathe being offered subject to an alleged lien of \$120.56 in favour of the claimants; one Henry Halford tendered for the purchase of the lathe, subject to that lien, and his tender was accepted by the liquidator, but, at the time the special case was settled, the sale had not been completed.

The claimants contended that the lathe was subject to a lien for the three sums of \$120.56, \$11.15, and \$134.89, in all \$266.50.

The liquidator contended that the lien was for \$120.56 only, and that the claimants must rank upon the insolvent estate as ordinary creditors for the balance of their claim.

Henry Halford contended only that he was entitled to the lathe freed and discharged from all the alleged claims except only the sum of \$120.56.

The Master in Ordinary held that the claimants were entitled only to a lien for \$120.56, and that they must rank as ordinary creditors for the balance of their claim, and gave no costs to any party.

The claimants appealed, and their appeal was heard by a Divisional Court composed of STREET and BRITTON, JJ., on the 5th and 6th November, 1901.

W. E. Middleton, for the claimants, contended that the agreement was good between the parties, and not affected by any statute, for the liquidator simply stood in the position of the company.

G. H. Watson, K.C., for the liquidator, contended that the sale of the lathe to Halford was made without notice of any claim to a lien for \$134.89 in respect of the other goods, but

only with the notice of the lien for \$120.56, which he had made. The lien agreement could not be maintained in face of the Conditional Sales Act and the Bills of Sale Act.

The following cases were referred to: *Helby v. Matthews*, [1895] A.C. 471, 482; *Stevenson v. Rice* (1874), 24 C.P. 245; *Walker v. Hyman* (1877), 1 A.R. 345, at pp. 350, 357; *Mason v. Bickle* (1878), 2 A.R. 291, 295; *Banks v. Robinson* (1888), 15 O.R. 618.

December 4. The judgment of the Court (stating the facts as above) was delivered by STREET, J.:—Under the terms of the contract between the parties, the title to the lathe has never passed out of the claimants; they still hold it, and are entitled to hold it until the full amount of their claim has been paid; and, inasmuch as, at common law, the company, to whom possession was delivered without title, could transfer no better title than they really possessed, it is plain that the rights of the claimants under the contract still exist, unless they have been taken away by some statute. The only statutes relied on by the Master in the judgment appealed from, and by counsel for the respondent on the argument before us, are the Act respecting Mortgages and Sales of Personal Property, R.S.O. 1897 ch. 148, and the Act respecting Conditional Sales of Chattels, R.S.O. 1897 ch. 149, and in considering these statutes it is necessary to bear in mind the position in which a liquidator stands in a compulsory winding-up, viz., that, while in no sense an assignee for value of the company, yet he stands for the creditors of the company, and is entitled to enforce their rights, because their right to prosecute actions themselves against the company and to recover their claims directly out of the property of the company is taken away by the Winding-up Act: *In re South Essex, etc., Co.—Ex p. Paine and Layton* (1869), L.R. 4 Ch. 215.

Under the provisions of the Conditional Sales of Chattels Act, R.S.O. 1897 ch. 149, the title of a purchaser in good faith and for valuable consideration from the bailee of goods under a contract such as that here in question, is entitled to prevail against the bailor unless certain requirements of the Act are complied with, but the rights of creditors of the bailee are not increased, and remain as if the Act had not been passed. The

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provisions of this Act, therefore, cannot help the liquidator in his capacity of representative of the creditors of the insolvent company, because the creditors never had a right to treat the bailee as owner; nor in his capacity of representative of the company, because the contract of the company with the bailee stands good both against the company and the liquidator.

The Chattel Mortgage Act, R.S.O. 1897 ch. 148, does not, in my opinion, assist the liquidator any more than the Conditional Sales Act. Its general scope and object were to prevent secret conveyances and mortgages of chattels by the owner by making them void as against his creditors, as well as against subsequent purchasers and mortgagees for value.

In the amendment to the Act made in 1892 by 55 Vict. ch. 27 (O.), certain extensions of this object were made. In the first place, the Act was made to apply, by sec. 1, to mortgages and sales of personal property, notwithstanding that the subject matter was not the property of the mortgagor or bargainor at the time of the making of the mortgage or sale, and that it might be intended to be delivered at some future time. This provision was apparently aimed at the practice of debtors agreeing to mortgage after-acquired property, a form of equitable charge which had been held not to be within the original Act: see *Horsfall v. Boisseau* (1894), 21 A.R. 663. This first extension of the original object of the Act does not seem intended to include agreements such as that now under consideration, when we consider the 5th section of the Act 55 Vict. ch. 27 (O.), which brings specially within the provisions of the Act certain classes of conditional agreements for the sale of chattels, but does not include the class to which the present agreement belongs. If it had been intended by the amendment of the Act to include conditional agreements such as the present, that would naturally have been effected by the 5th section of the Act, and would not have been left to be gathered as a matter of doubtful inference from the general language of the 1st section.

In my opinion, however, the agreement in question cannot be treated as a mortgage, or as intended to operate as a mortgage, within the meaning of the Chattel Mortgage Act. The good faith of the parties to the contract is not

impeached or attacked, and the agreement must be taken to express the true contract between them, viz., that until the bailees should pay, not only the purchase money of the lathe itself, but also the purchase money of any other goods they should purchase after the sale of the lathe and before it was fully paid for, the property in it should remain in the claimants. I can find nothing in any statute affecting the validity of a contract of this kind, and I think it, therefore, entitled to prevail: *Stevenson v. Rice*, 24 C.P. 245; *Ex p. Crawcour* (1878), 9 Ch. D. 419; *Forristal v. McDonald* (1883), 9 S.C.R. 12; *Banks v. Robinson*, 15 O.R. 618; *Helby v. Matthews*, [1895] A.C. 471.

As the lathe reached the hands of the liquidator subject to the lien of the claimants for their claim of \$266.50, their right to recover this sum in full out of the estate is not affected by the subsequent sale by the liquidator to the purchaser Holford.

The appeal will, therefore, be allowed, with costs payable by the liquidator, and the claimants should also have their costs of the contest in the Master's office.

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Dec. 4.

RE MERCHANTS' LIFE ASSOCIATION OF TORONTO.
VERNON CLAIMS.

Insurance—Life—Unmatured Policy—Present Value of Reversion—Mode of Calculating—Statute—Amendment—Declaration as to Former Law.

The ascertainment of the present value of the reversion in the sum assured by the policy at the decease of the life insured, as directed by the judgment in 1 O.L.R. 256, is a matter of simple calculation from the ordinary life insurance tables; the premium actually paid by the insured has nothing to do with the calculation.

The statute 1 Edw. VII. ch. 21 (O.), assented to on the 15th April, 1901, altering the manner of valuing unmatured policies, and enacting that the alterations declared the law of the Province as it existed on the 14th April, 1892, did not affect the rights of the claimants under their policies, because those rights had been declared by the judgment in 1 O.L.R. 256 before the Act was passed, and judgments are not reopened even by such legislation.

THIS was an appeal by Priscilla Catherine Vernon and James Rodney Vernon from a certificate of the Master in Ordinary, dated the 30th April, 1901, whereby he certified that he had allowed the claims of the appellants respectively at \$33.28 and \$32.29.

By the order of a Divisional Court (1 O.L.R. 257) upon an appeal from a former certificate of the Master whereby he certified that he had disallowed the claims of the appellants, who were policy-holders in the association, to rank as creditors upon the estate of the association in liquidation, the matter was referred back to the Master with instructions that, as of the date of the commencement of the winding-up, he should calculate, first, the present value of the reversion in the sum assured by each policy at the decease of the life assured, and, second, the present value of a life annuity of an amount equal to the future premiums which would become payable during the estimated duration of the life assured, and to allow the difference, if any, in favour of the first calculation, as the sum for which the creditor should be entitled to rank.

Upon this reference back, the Master made the calculation and gave the certificate now appealed against.

The appeal was heard by a Divisional Court composed of STREET and BRITTON, JJ., on the 5th November, 1901.

H. T. Beck, for the appellants, referred to the ordinary life insurance tables, and contended that the method of computation adopted by the Master, and supported by the evidence of the actuaries called by the Registrar of Friendly Societies, was not in accordance with the order of the Divisional Court, and that the present value of the amount insured was fixed by the tables and was equivalent to the single premium, and that the element of the amount of the premium called for in the policy had nothing to do with this calculation. The statute 1 Edw. VII. ch. 21 (O.), although a public Act, does not in any way affect the Divisional Court order. The statute does not in its terms nullify the judgment of the Court, and the only matter before the Court is whether the Master has followed the directions in the judgment contained. The Court has no jurisdiction to consider whether the previous judgment of the Divisional Court is wrong as a matter of law, or has been subsequently declared to be not in accordance with the law. This, if it can be considered at all, must be as a matter of appeal. The statute is *ultra vires*, or at any rate must not be taken to have been intended to affect the order of the Divisional Court. He referred to *The Governor v. Porter* (1844), 5 Humph. (Tenn.) 165; *Postmaster-General v. Early* (1827), 12 Wheat. 136, 148; *Greenough v. Greenough* (1849), 11 Pa. St. 489; *Reiser v. William Tell Saving Fund Association* (1861), 39 Pa. St. 137; Sutherland on Construction of Statutes, secs. 200, 201; Potter's Dwarries on Statutes, 1871, p. 68, notes.

J. Howard Hunter, contra. This Court in the former appeal (1 O.L.R. at pp. 259, 260) adopted *Lancaster's Case* (1871), L.R. 14 Eq. 72n, and decided against the contention that the policies should be valued according to the health of the assured. In *Lancaster's Case* Lord Cairns also decided that winding-up constitutes no breach of contract, and gives no right to damages; and that, for any value to reside in the policy, at least the net premium required by the table must have been paid. The value of a policy is only the accumulated excess of past yearly premiums over the value of each year's risk, and where the policy-holder pays merely the value of each year's risk the policy has no value: British Inst. Actuaries Text Book of Life Contingencies, p. 314, par. 3; p. 318, par. 9. In these

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two friendly society policies, each of \$1,000, issued at ages 41 and 42, and valued after four years' duration, the annual policy premiums were only \$12.76 and \$13.10, or slightly more than one-half of the net premiums required by the institute four and a half per cent. tables. From Hardy's Valuation Tables, p. 103, and the concurrent evidence of all the actuaries examined in this case, it is clear that, even if these had been policies of the very best insurance companies, their highest possible values would be \$59.23 and \$61.84; while the appellants claim \$212.50 and \$221.12. Where the policy annual premium, instead of the net annual premium, shewn in the tables, is used for valuing a policy, the single premium or reversion used in the calculation must also be the policy single premium, and not the net single premium: Institute Text Book, p. 322, par. 18; *New York Life Ins. Co. v. Statham* (1876), 93 U.S. 24. It was by erroneously combining in the calculation the net single premium with the policy annual premium that the appellants' figures were obtained. The valuation of a policy differs altogether from the discounting of a debenture or promissory note: Bunyon's Law of Life Assurance, 3rd ed., pp. 6, 7.

December 4. The judgment of the Court was delivered by STREET, J.:—The Master in Ordinary, in arriving at the sums for which the claimants are entitled to rank in the winding-up of this company, has not correctly followed the directions prescribed in the judgment of the 5th February, 1901, of the Divisional Court upon an appeal in respect of these identical claims from a former certificate of his, as to the method to be followed in ascertaining their amount.

By the judgment of the 5th February, 1901, referred to, it was ordered that the claims in question be referred back to the Master in Ordinary, with a direction that, as at the date of the commencement of the winding-up, he do calculate, first, the present value of the reversion in the sum assured by each policy at the decease of the life assured, and, second, the present value of a life annuity of an amount equal to the future premiums which would have become payable during the probable duration of the life assured, and that he allow the difference in favour of

the first calculation as the sum for which the claimant should rank.

The two sums to be arrived at were mere matters of simple calculation from the ordinary life insurance tables, which the Master has made use of in arriving at his result, but which he has not properly applied. The line applicable in the case of James R. Vernon for the purpose of ascertaining the present value of the reversion in the \$1,000 assured by his policy is the following:—

Age	<i>ax</i>	<i>Ax</i>	<i>Px</i>
45	13.1645	.390044	.027537

and in the case of Priscilla C. Vernon,

46	12.9267	.400284	.028742.
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The column *ax* shews the present value of an annuity of \$1, payable at the end of each year during life. When the annuity is payable yearly in advance, the number before the decimal point is to be increased by 1.

The column *Px* shews the amount of the net annual premium to be charged during life upon an insurance of \$1, in order that a proper fund may be provided to meet the insurance at death.

The column *Ax* is the result of the multiplication of the figures in the column *ax*, plus 1, by those in *Px*, and shews the amount to be paid down in advance as a single premium for the insurance of \$1 payable at death; in other words, it is the present value of the reversion in \$1 payable at death.

Multiplied by 1000, the figures in the column *Ax* furnish an absolute and immediate answer to the first calculation required to be made under the judgment of the 5th February, 1901; the answer being that the present value of the policy on the life of James R. Vernon is \$390.04, and of the policy on the life of Priscilla C. Vernon is \$400.28.

Instead of applying these tables, the Master has taken the figures in column *ax*, plus 1, in each case, but, instead of multiplying them by the figures under *Px*, in order to arrive at the reversion or single premium result, he has multiplied them by the figures actually charged by the insolvent association to persons insuring with them at the ages of 45 and 46 respectively, that is to say, in the case of J. R. Vernon \$14.68, and Priscilla C. Vernon \$15.44, and the result is that the present value of

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the reversion in the sum assured by the policy is brought out in J. R. Vernon's case at \$207.93, instead of \$390.04, and in Priscilla C. Vernon's case as \$215.02, instead of \$400.28.

The reason given by the actuaries and adopted by the Master for this mode of calculation seems to me to be plainly unsound. The present value of the reversion in a future payment is a simple matter of ordinary discount, based only on the rate of interest applicable and the period of ultimate payment. It is to be arrived at upon the same principle whether it be a deferred payment upon an insurance policy or upon an ordinary promissory note payable in three months. In the present case the insurance company has promised to pay \$1,000 upon the death of each of these claimants, and has broken its contract, and the first question may be stated as being, what is the discount for cash upon that sum, the rate of interest being four and one-half per cent., and the period of payment the number of years the assured are calculated to live according to the accepted tables, or, in other words, what is the present value of the reversion?

It is plain that the fact of the company having undertaken its contract upon an insufficient consideration has nothing to do with this particular question; the arithmetical value of the reversion is not decreased by the fact that the premium stipulated for was too low, nor would it be increased had the premium stipulated for been higher than the standard or table rate; the premium paid has nothing whatever to do with this calculation.

The Master agrees with the claimants' contention, which is found in the evidence of all the witnesses, as to the second calculation directed by the judgment of the 5th February, 1901, viz., the present value of a life annuity of an amount equal to the future premiums which would have become payable during the probable duration of the lives assured, so that I need not discuss the manner in which they are arrived at. The proper result is as follows:—

James R. Vernon,

Value of reversion in \$1,000 \$390.04

Present value of life annuity equal to
stipulated premium 177.54

Amount for which he is entitled to
rank \$212.50

And in the case of Priscilla C. Vernon,

Value of reversion in \$1,000 \$400.28

Present value of life annuity equal to
stipulated premiums 179.16

Amount for which she is entitled to
rank \$221.12

The sums thus arrived at give to each of the assured the benefit of the good bargain they had made with the company in obtaining their policies at premiums which could only result in loss to it; but there was nothing in the law as it stood at the time of the judgment of the 5th February, 1901, which protected an insurance company against its own improvident contracts, when once it had gone into liquidation.

There will be a judgment, therefore, declaring each of the claimants entitled to rank upon the estate for the amounts ascertained as above, and ordering accordingly, and ordering payment by the liquidator, forthwith after taxation, of the costs of the claimants in the Master's office and of the costs of these appeals.

During the argument the liquidator disclaimed any wish or intention to invoke against the appellants the provisions of certain amendments to the Insurance Act made during the last session of the Provincial Legislature bearing upon the questions at issue.

Since the argument in Court, however, he has handed in to us a further written argument in which he asks that those amendments be applied to the claims of the appellants, and it has become necessary that we should consider them. The amendments in question are those contained in six sub-sections of sec. 1 of ch. 21 of 1 Edw. VII., and in the five sections forming sched. F to that statute. These sections unquestionably

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alter the law as it previously existed in several important respects, notably in the manner of valuing unmatured policies, and impair the rights of persons who have entered into contracts with this particular company at all events. Sub-section (6) of sec. 1 of the Act, however, boldly enacts that these amendments and additions, which were only enacted on the 15th April, 1901, "declare the law of the Province as it existed on and has existed since the 14th April, 1892," without any saving of rights acquired, of contracts entered into, or of actions pending, under the law as it stood. This is *ex post facto* legislation of the most objectionable character, but, being upon the statute book, it of course governs us. It does not appear, however, to affect the rights of these appellants, because those rights had been declared by our judgment on the 5th February, 1901, whereas the Act was not passed until the 15th April following, and judgments are not reopened even by such legislation as that referred to: *Hardcastle on Statutes*, 3rd ed., p. 363; *Eyre v. Wynn-Mackenzie*, [1896] 1 Ch. 135; *Day v. Kelland*, [1900] 2 Ch. 745.

In the judgment of the Divisional Court it is directed that "the future premiums which would have become payable during the probable duration of the life of the assured," plainly meaning the policy premiums, are to be the foundation upon which the present value of the life annuity is to be calculated, and this explicit declaration, having passed into judgment before the amending Act, is not reopened or affected by the contrary declaration contained in sub-sec. 4 of sched. F. The present value of the reversion in the sum insured has been calculated by me upon the rule laid down in sub-sec. (5) of that schedule, F., as I understand it, although the meaning of that sub-sec. (5), as I understand it, would be placed beyond any doubt by the insertion of the words "according to the said tables" after the word "age" in the fourth line of the sub-section.

In my opinion, therefore, the Act of 1901 has not affected the claimants' rights.

T. T. R.

[IN THE COURT OF APPEAL.]

JACKSON V. GRAND TRUNK RAILWAY COMPANY.

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Trial—Jury—Verdict—Weight of Evidence—Railways—Fire.

In an action against a railway company to recover damages because of fire caused by sparks from an engine, two witnesses called on behalf of the plaintiff, men without much practical experience, testified that, in their opinion, the engine in question was defective constructively in a certain particular, while eleven witnesses called by the defendants, all men of practical experience, testified that the engine was constructed in accordance with the best prevailing practice. The jury found for the plaintiff:—

Held, that in a case of this kind, depending upon the weight to be given to scientific and expert testimony and not upon questions of credibility and demeanour, such a verdict could not stand, and it was set aside and the action dismissed.

Judgment of Falconbridge, J., reversed, ARMOUR, C.J.O., dissenting.

APPEAL by the defendants from the judgment at the trial.

The plaintiff sued to recover damages for the destruction by fire of his barns and their contents, caused, as it was alleged, by sparks or cinders from one of the defendants' locomotive engines. The cause of action, as it was set out in the statement of claim, was as follows:—“(1) On and before the 27th day of April, 1899, the plaintiff was possessed of barns, stables, and sheds, and cattle, stock, grain, produce, and implements, contained therein, or in proximity thereto, all situate on the plaintiff's farm adjacent to the defendants' line of railway.

(2) On the 27th day of April, 1899, the defendants were possessed of certain locomotive engines propelled by steam, and containing fire and burning material.

(3) On the said date, while the said engines were being driven along the defendants' said line of railway near to the plaintiff's said farm, under the management and control of the defendants, the defendants so negligently and unskilfully managed said engine or engines and the fire and the burning material therein contained, and the said engines, or one or more of them, were or was so insufficiently or improperly constructed and operated, were or was in such an improper condition or state of repair, that sparks or cinders from the said fire and burning matter escaped therefrom to and upon the plaintiff's premises, by reason whereof the said plaintiff's barns, stables,

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sheds and chattel property were set on fire and were totally burned and destroyed between the hours of one and three in the afternoon of the said date, whereby the plaintiff lost the use and enjoyment of said barns, stables, sheds and chattel property, and otherwise sustained damage."

The defendants pleaded not guilty; by statute.

The trial took place at Toronto before Falconbridge, J., and a jury. A motion for nonsuit made at the close of the plaintiff's evidence, and renewed at the close of the whole evidence, was denied. It was agreed that if the plaintiff was entitled to a recovery, the damages should be assessed at \$5,850.

Questions were given to the jury to answer, which, with their answers, were as follows:—

1. "Was the fire in question caused by a spark or sparks from either of the engines, 215 or 531? Yes. Unanimous answer.

2. If so, from which of them? We believe that it was 215.

3. If so, did such spark or sparks escape by reason of the negligence of the defendants? Yes.

4. If so, wherein did such negligence consist? Smoke box.

5. Did the defendants, under all the circumstances, take fair and reasonable precautions, and exercise reasonable care to have their engine and appliances for preventing the emission of fire properly constructed? No."

On these answers the learned Judge directed judgment to be entered for the plaintiff for the damages agreed on.

From this judgment the present appeal was brought by the defendants, on the grounds, (1) that assuming the fire was caused by sparks or cinders from one of the defendants' engines, there was no evidence upon which the jury could reasonably find that they came from engine No. 215; (2) that the evidence established that the defendants in the construction of engine No. 215 adopted every known precaution to prevent the escape of sparks therefrom, and therefore were not chargeable with negligence; and (3) that the answers of the jury were contrary to the evidence or the weight of evidence.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 15th and 16th of May, 1901.

Wallace Nesbitt, K.C., and *H. E. Rose*, for the appellants.

Johnston, K.C., and *J. D. Montgomery*, for the respondent.

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November 6. OSLER, J.A.:—It seems extremely probable that the fire which caused the destruction of the plaintiff's buildings was caused by a spark from one of the engines attached to the train which passed along the line near the plaintiff's farm shortly before the fire broke out. The difficulty in his way was to establish that the fire was attributable to the defendants' negligence in the construction or management of either of them. No fault could be found with the management of either, or with the construction of the larger of the two, nor was it suggested that either was in the least degree out of repair. The one ground of negligence relied upon was that the smaller engine of the two had been constructed with too short a smoke box, and it was said that if the box had been longer the sparks or cinders which escaped through the stack would be more likely to have been broken up and extinguished before doing so.

Two witnesses for the plaintiff were of opinion that the box should have been longer, but neither of them was able to say that it was out of proportion to the size and type of the engine it was fitted to. Opposed to these two witnesses, who were not railway engineers, or employed in railway business, though one of them had been so in former years, was the evidence of a large number of persons familiar with the railway world, including the master mechanic of the Intercolonial Railway, the superintendent of motive power of the Grand Trunk Railway, and other practical men acquainted with the construction of railway locomotives, and with the most modern and approved devices for the promotion of safety in operating them, occupying responsible positions in the well known and extensive locomotive works in Pennsylvania; in Richmond, Virginia; and in Schenectady, N.Y. These witnesses approved of the construction of the engine in question, and specially affirmed the practical sufficiency of its smoke box, as being of the proper

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length in proportion to its size. In the face of such a body of testimony no jury could reasonably adopt the opinions of the plaintiff's expert witnesses, and convict the defendants of negligence because they had not followed the practice which they thought was proper when the opinion of the great body of practical constructors and railway men was the other way. I am also inclined to think that even could it have been found that the smoke box of the smaller engine should have been longer, it must nevertheless have been a mere matter of conjecture whether the spark which caused the damage came from it or from the larger engine. I refer to the case in 20 Rettie, cited in my learned brother Lister's judgment, which I have had an opportunity of reading, and with which I agree, and to *Shaftesbury v. London and South Western R. W. Co.* (1895), 11 Times L.R. 269.

Fields v. Rutherford (1878), 29 C.P. 113, and *Jackson v. Hyde* (1869), 28 U.C.R. 295, may also be referred to as illustrations of the way in which the Court has felt itself at liberty to deal with verdicts where the question of fact is one which depends upon scientific evidence.

There is no reason to suppose that on another trial other evidence in support of the plaintiff's view would be forthcoming.

I think the action should have been dismissed at the trial, and would, therefore, allow the appeal.

MACLENNAN, J.A.:—I am of the same opinion.

MOSS, J.A.:—The plaintiff's cause of action as set forth in the statement of claim was that while two locomotive engines, the property and under the control and management of the defendants, were being driven along the defendants' line of railway, the said engines or one of them, and the burning material therein, were or was so negligently and unskillfully managed, and the said engines were or one of them was so insufficiently or improperly constructed and operated that sparks or cinders from the fire and burning matter therein escaped and set fire to the plaintiff's buildings.

The locomotive engines in question were drawing a freight train going north towards Allandale, a station on the line of

railway. One was a large engine known as No. 531; the other, a smaller engine, known as 215. At the trial the plaintiff's counsel conceded after all the evidence was in that with respect to engine 531 there was no case to go to the jury. It was also conceded that with respect to No. 215 there was no case of negligent management or want of proper skill in operation on the part of the persons in charge. But it was contended that there was evidence of improper or insufficient construction conducing to the throwing of sparks, and that there was negligence in not adopting the best means of preventing spark throwing.

The contention was that the smoke box should have been longer. There was no complaint that as regards the mechanical work of construction or the state of repair of any part of the various appliances there was any defect.

The smoke box is 46 inches in length, the cylinder being 16 x 26 inches, and the head of steam 140.

For the plaintiff it was said that the smoke box should have been from 5 feet to 5 feet 10 inches, or what is known as the long extension box. For the defendants it was said that the 46 inch box was the proper size for an engine of the dimensions, and with the steam draught of No. 215, and that a longer box would be of no advantage in arresting or preventing the escape of live sparks or cinders.

The jury, in answer to questions, found that the fire was caused by a spark from either No. 215 or 531.

In answer to the question "If so, from which of them?" they answered, "We believe that it was 215." In answer to the question "Did such spark or sparks escape by reason of the negligence of the defendants?" they answered, "Yes," and to the question "If so, wherein did such negligence consist," they answered "Smoke box." The last question was "Did the defendants, under all the circumstances, take fair and reasonable precautions and exercise reasonable care to have their engine and appliances for preventing the emission of fire properly constructed?" to which the jury answered "No."

Counsel for the defendants requested that the jury should be also asked to answer "Do you think according to the size of No. 215 the smoke box was the proper length?" but this question was not put.

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The learned trial Judge entered judgment for the plaintiff upon the answers given.

The real question was whether the use by the defendants of the 46 inch smoke box on an engine of the dimensions and power of No. 215 was evidence of negligence on their part. There was no evidence shewing that it was the practice to have a longer box on such engines. Nothing to shew that on other lines of railway there were now in common use engines of the dimensions and power of No. 215 carrying a longer box or that amongst constructors of locomotive engines or railway operators there was an established rule that a 46 inch box was insufficient for such an engine as No. 215.

Two witnesses for the plaintiff gave it as their opinion that a longer box would be better, but they were unable to give instances of their general or even occasional use upon modern railways.

Upon this evidence it would be contrary to the authorities, as I understand them, to hold the defendants liable. The observations of Kekewich, J., in *National Telephone Co. v. Baker*, [1893] 2 Ch. at p. 204, appear to be pertinent to the testimony adduced to support the plaintiff's contention.

The evidence for the defendants was direct to shew that the box was of the proper and best size most suitable for the engine.

It also negatived the idea that a longer box would be of any advantage in preventing the escape of live sparks or cinders.

It further went to shew that the tendency was towards the decrease rather than the increase of the length of the smoke boxes.

The testimony fails in my judgment to supply evidence upon which a finding of negligence could be supported. The jury's answer to the question of wherein did the negligence consist, "Smoke box," seems to indicate the difficulty they had in defining the negligence. It is vague and inconclusive, leaving open the whole question in contest.

And the last question which they answered in the negative affords no additional assistance in ascertaining their opinion upon the question of the proper length of the smoke boxes in

relation to locomotive engines of the dimensions and capacity of No. 215.

In my opinion the appeal should be allowed and the action dismissed with costs.

LISTER, J.A.:—The evidence shews that the plaintiff was the owner and occupier of lots 21 and 22 in the 3rd concession west of Yonge street, in the township and county of York, to the west of and abutting upon the defendants' railway line; that between 2 and 3 o'clock of the afternoon of the 27th of April, 1899, about five minutes after the passing of one of the defendants' freight trains called "Coady's Special," which was being hauled by two engines, one a large engine numbered 531 and the other a smaller engine numbered 215, grass in the plaintiff's orchard was observed to be on fire, and in a short time, perhaps two minutes, another fire was seen to be travelling through the grass in the direction of the plaintiff's barn. The grass was dry and the wind was blowing from the east in the direction of the plaintiff's buildings, at a velocity of from 21 to 23 miles an hour. In spite of all that could be done to extinguish the latter fire, it communicated with the plaintiff's barn and other buildings, and destroyed them with the greater part of their contents.

The grade of the railway was 60 feet to the mile, and the train at the time of the accident was proceeding north "up-grade." A witness said that from the noise and smoke one of the engines—he did not know which—"seemed to be working hard."

It is not in dispute that engine 531 was a large engine with an 18 x 24 inch cylinder, and in every respect efficient. Nor is it in dispute that engine 215, a smaller engine with a 16 x 26 cylinder, was in every respect properly constructed, except in the single particular, that its smoke or extension box was, as the plaintiff alleges, not sufficiently long; in other words, that it should have been fitted with a long instead of a short or a medium extension box. Not only the evidence, but the observations at the trial of the learned counsel for the plaintiff (Mr. Johnston), which form part of the record, make it clear that the chief, if not the whole, contest at the trial was upon the

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question whether the use by the defendants of the extension box fitted to engine 215, when the accident occurred, did or did not amount to negligence. Mr. Johnston, referring to this point, said: "Nobody for a moment said that there was anything wrong with the working of the engine in a sense, or with the construction of the engine as an engine; we are not complaining of that. Let me also say, we are not complaining of engine number 531. What we complain of is engine number 215. We rest our case on that. Failing number 215, we fail altogether; I think it is sufficient to say that. Find for plaintiff if you can on the evidence; failing 215 we fail in our case."

I think that the evidence sufficiently shews that the plaintiff's loss was occasioned by the escape of sparks or cinders from one or both of the engines in question. But that alone is not enough to entitle him to a recovery. He must in addition establish—by such evidence as will satisfy a reasonable mind—negligence on the part of the defendants, to which his loss is attributable, that is to say, that the sparks or cinders which caused the loss escaped through the failure of the defendants to use the best practicable means then known to obviate that danger, or that it was due to the negligence of the defendants' servants in working the engines. "It is now well settled law that in order to establish a case of liability against a railway under such circumstances it is essential for the pursuers to establish negligence. The railway company having the statutory power of running along the line with locomotive engines, which in the course of their running are apt to discharge sparks, no liability rests upon the company merely because the sparks emitted by the engine have set fire to adjoining property. But the defenders, although possessing this statutory power, are undoubtedly bound to exercise it reasonably and properly, and the test whether they exercise the power reasonably and properly appears to me to be this. They are aware that locomotive engines are apt to emit sparks. Knowing this they are bound to use the best practicable means, according to the then state of knowledge, to avoid the emission of sparks which may be dangerous to adjoining property; and if they, knowing that the engines are liable thus to discharge sparks, do not adopt that reasonable precaution, they are guilty of negligence": *per*

Herschell, L.C., in *Port Glasgow and Newark Sailcloth Co. v. Caledonia R.W. Co.* (1893), 20 Rettie 35.

I refer also to the judgment of my learned brother Osler in the recent case in our own Court of *Oatman v. Michigan Central R.W. Co.* (1901), 1 O.L.R. 145, where the cases on this subject are collected.

The question then arises: Has the plaintiff made out a case of negligence? As I have already pointed out, the plaintiff rests his right to recover in this action entirely upon the alleged neglect of the defendants to provide engine 215 with the best mechanical contrivance to prevent the throwing of cinders from the smoke stack. It is conceded that the smoke or extension box is the best known and most efficient contrivance for lessening the risk of damage by fire caused by sparks and cinders emitted from the smoke stack of a locomotive engine. Its purpose is to deaden the sparks and cinders which come from the fire box, before being emitted from the smoke stack. It extends out from the main smoke box, which contains the steam pipes and the exhaust pipe, and above which is the smoke stack. The exhaust pipe is carried up to a level with the top of the tubes of the boiler. Solid plates are placed around it. A diaphragm or deflecting plate, where the extension box is what is known as a long box, is placed in front of the exhaust pipe. If the box is of medium size—as here—the plate is partially placed in front of the exhaust pipe. There is a wire netting with a quarter-inch mesh running from the dead plates in the main smoke box forward to the extension box door. The exhaust steam from the cylinders passes into the exhaust pipe, and as it is ejected therefrom into the smoke stack it creates a draught through the fire box, which causes the smoke and embers to be drawn through the tubes of the boiler. The smoke passes into the smoke stack and the sparks and embers strike, or, as a witness said, “rattle” against the solid plates, then strike the deflecting plate and are thrown down under it, to the bottom of the smoke or extension box, where by reason of the vacuum caused by the exhaust, they are agitated or “whirled around” against the netting, etc., and, when broken sufficiently small, pass out through the netting into and then out of the smoke stack. The object is to delay the embers in the smoke box

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until they are dead. While this end is largely attained by the contrivance I have tried to describe, the evidence, I think, makes it clear that it is not possible to construct an engine that will not throw live embers. There are three classes of smoke box : first, the long, or sixty inch box ; (2) the short, from 24 to 28 inches long ; and (3) the medium. The box in question belonged to the latter class ; it was 46 inches in length. What the plaintiff relied on as constituting negligence on the part of the defendants is, not equipping the engine in question with a long box. It is contended that an engine fitted with a long box throws fewer embers than one fitted with a short box, and in support of this view two witnesses were called on the part of the plaintiff, Peter Clarke and Robert Pink. Clarke had had about forty years' railway experience as mechanical superintendent, chief draughtsman, and foreman, but, at the time of the trial, had not been connected with any railway for nearly eight years. He regarded the engine in question as a small engine, and thought the long box the best "to prevent the throwing of fire." He said: "The deflector in the long box is the best, that is, in front of the exhaust;" and in answer to the question, "Why is it the best?" said: "There is more room. You get a good large combustion chamber there for the ashes to work about in, which you cannot do in the short box without carrying it back to the exhaust." On cross-examination he said :

"Q. What would you call a long box ; about what length ?

A. About 5 feet 10 inches. Q. You had no short boxes at that time ? A. No. Q. Where did you get your experience of short boxes ?

If you had no short boxes under your supervision, where did you get your experience of them ? A. I say I had very little to do with short boxes. Q. Where did you get the observation you speak of, as to their throwing fire ? A.

I am speaking mechanically now. Q. Where did you have any actual experience ? A. I am giving evidence as an expert ; I am not giving evidence as an engine driver. Q. You say you are giving evidence as an expert in boxes. I want to see what your experience has been. Where has your experience been as to short and long boxes ? A. My experience in short boxes has

been very little. Q. Will you give me one short box you have

seen under trial? A. Yes. Q. Where? A. On the Great Western."

Further on he said: "Q. Then if you cannot tell me what the heating surface was of engine number 215, how do you pretend to say what vacuum she finds necessary in front of the netting? A. I did not say what she required. Q. There is a great deal to be taken into account in an engine, in the construction of her—you have to have her so built as to steam properly? A. Yes. Q. What would be the effect of giving too large vacuum? A. Draught on the fire would be too much. Q. And there would be too much combustion? A. Yes. Q. That would not be the proper way of running an engine? A. No, sir. Q. You have to build an engine with the proper vacuum in view? A. Certainly. Q. Engines vary in the amount of vacuum they have in the front end? A. Yes, according to the heating surface and the exhaust."

And again: "Q. The idea of constructing the smoke box is not to carry cinders from one end of the road to the other and let none go out? A. No, the long box is to kill them. Q. You know of no engine that won't throw some sparks? A. No. Q. It is impossible for railways to run without taking the chance of setting some fire? A. That is so. Q. And the spark, as to how far it will carry and keep alight depends upon the size of it when it leaves? A. Well, there is a limit to the size that will go out; it may be long but cannot exceed the quarter or less than a quarter, the size of the mesh of the netting; the chances are the cinders thrown alight will be very small. Q. And according to the size of the spark is the danger of its setting fire to anything? A. Well, some sparks will keep longer lighted than others, just the same as some matches will. Q. The danger is the more fire in it? A. Yes."

Pink considered that the short was not as safe as the long or extension box; he thought the short box "will throw more fire than the extension box," but his evidence leads me to the conclusion that he had had but little knowledge of the practical working of the latter box. On the other hand, eleven witnesses called for the defendants, all men of experience, engaged either in the practical working of railways or in the construction of locomotive engines, substantially agreed that the smoke box in

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question, having regard to the size of the engine, was, to use their words, "good practice." Mr. Villa, engineer of tests in the Baldwin Locomotive Works—which turn out 800 locomotives a year—deposed:—"Q. Then take an engine, 16 × 26 cylinder, with an area of ten square feet of netting, straight stack, and an extended smoke box 3 feet 10 inches; the engine is said to steam freely—what do you say as to that being good or bad practice? A. I should say that was good practice. Q. Have you examined the devices, the two devices, including the brick arch, the deflector plates, and so on? A. Yes, sir. Q. Do you know of any device, any better device now in use for the prevention of fire than those models shew? A. No, sir."

Again he said:—"Q. If the smoke box was any longer than 3 feet 10 inches, would it be of any advantage in arresting sparks? A. No, sir; I think not. Q. What would become of that? A. The exhaust going up the stack produces the draught, comes through the flues, and against the deflecting appliances and up the stack. If you had the smoke box too long the cinders would shew in front and gather in front of the smoke box, and produce something the same as the draught in the front there; *the smoke box would automatically adjust itself to the proper size.* Q. What is the tendency of your works in reference to extension boxes? A. The present tendency is to shorten up smoke boxes; get them shorter. Q. What would you say about the engine with 18 by 24 cylinder, with an area of 12 square feet of netting, and with a smoke box practically 5 feet long? What would you say about that? A. Well, the smoke boxes, 5 feet or 60 inches and 46 inches, would be relatively the same—taking the difference between the size of the cylinder in one and the other?"

Mr. Gentry, assistant superintendent of the Richmond Locomotive Works, deposed:—"Q. I give you an engine cylinder 16 by 26, 10 feet square netting, 3 feet 10 inches smoke box, coupled with the fact that the engine steams freely, what would you say of that engine? A. I would say it was in keeping with good practice. Q. Would you extend that smoke box any? A. I would not; not if she is giving the results you say the is. Q. Now, have you examined the model of the two

engines that are in question here—Nos. 215 and 531? A. I have. Q. Commencing with the brick arch, and ending with the various devices there inside and connected with the smoke box, do you know of any other device in the railway world better fitted for the prevention of the spreading of fire? A. I do not. Q. Can you suggest any device we could adopt that would assist us in that direction? A. I cannot. Q. Then take the engine I have described to you, smoke box 3 feet 10 inches—do you think extending that smoke box would have any effect in the throwing of sparks or fire? A. I think not. Q. Supposing you put in the smoke box longer than 3 feet 10 inches, an engine steaming freely, what would become of your sparks? A. They would simply form a bank of cinders, go into the front until they reach a certain line, and then they would be drawn out as if the front was much shorter; in a very short time it regulates itself; this spark line will define itself along the front so you will see it.”

In cross-examination he said:—“Q. If you are required to make a long smoke box, you have to generate more steam and get more pressure to run your train? A. Then *we would have to increase the size of our cylinders and everything.* Q. In speaking of the larger vacuum necessitating more fire, does that create more sparks? A. Yes, the greater the amount of steam the more coal is used, and the more sparks are thrown. Q. And take a 50 to 60 inch smoke box, how do the sizes of engines compare? A. The largest, I think, 23 by 30 inch cylinders. Q. How would that engine correspond with say 16 by 26 cylinders? A. If the ratio was carried out, the 16 by 26 would have more than is necessary; we would consider the smaller engine best equipped; if you apply the rule in proportion, it would be more than necessary; but of course we all recognize the fact that in practice you cannot work the ratio out; this engine is probably as small as you could turn out.”

On re-examination he said:—“Q. Then you have examined, I believe, the models of 215 and 531, the engines in question here? A. Yes. Q. And you have seen the brick arch and the various devices for the prevention of fire in the extension boxes? A. I have. Q. Is there anything in the way of device you can suggest that the Grand Trunk could have there other

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than the devices these engines have for the prevention of fire ?
A. There is not. Q. I give you an engine, 16 by 26, area 10 square feet of netting, straight stack, extension smoke box 3 feet 10 inches, which allows the engine to steam freely—what would you say as to that engine ? A. Why I should consider that to be a good arrangement and good practice. Q. Would you extend that box any in such an engine ? A. I would not. Q. Do you think extension would have any effect in preventing spark throwing ? A. I do not think it would have any effect in preventing spark throwing. Q. The further extension ? A. The further extension would offer a place for storing sparks ; that certainly does not afford any better means for the prevention of the throwing of fire, of sparks ; I cannot see any good in that ; I do not see how it could possibly prevent the throwing of sparks ? Q. When sparks are stored within the first five miles, you get the extension box packed to the usual dimension of 3 feet 10 inches ? A. Yes, it will fill up to about that line. Q. In other words, it will fill up to the line where its practical utility ends ? A. Yes.”

Wm. Newcombe, a locomotive engineer of twenty-nine years' experience, referring to an increase of steam as affecting the vacuum in the smoke box, said : “ A. Our small engines carry 140 pounds pressure. Q. That is for public safety ? A. Yes. Q. No matter at what speed they want to run, they have to be content with 140 pounds pressure ? A. Yes. Q. If you increase the fire and get up more steam, would it have the slightest difference on the exhaust box in working ? A. No ; you can have 140 pounds and no more. Q. No matter how the fire is you cannot get more steam ? A. Our boilers are regulated ; they are set at 140 pounds in the shops, and nobody can interfere with them until they come back to the shop ; the safety valve is set at 140 pounds ; and any engineer found interfering with the safety valves is subject to immediate dismissal ; no engineer is allowed to tamper with the safety valve. Q. If they were to interfere ? A. Somebody would be blown up, perhaps. Q. All this talk my learned friend has had about steam pressure, the vacuum, the velocity, and the nozzle, is all very fine in theory ; but how is it in practice ? A. You can-

not put any more steam on the engine than its working capacity will allow."

With reference to the other witnesses called for the defence, it is sufficient to say that their evidence in every material particular corroborates the evidence of the witnesses for the defence, a part of which I have quoted. Upon the whole evidence I do not think it can be doubted that the plaintiff's loss was not the result of any negligence on the part of the defendants. Apart from the sum the plaintiff has received, or will receive, from the insurance company, he has sustained a serious loss, but under the facts here, the law, in my opinion, does not require the defendants to compensate him for that loss. Looking at the whole of the evidence, the finding of the jury in respect of negligence on the part of the defendants is one which, in my opinion, they could not properly find.

For these reasons I think the appeal should be allowed and the action dismissed with costs throughout.

ARMOUR, C.J.O.:—The first question to be determined is did the plaintiff on his part establish by evidence facts from which, and from the reasonable inferences to be drawn therefrom, negligence might be reasonably inferred by the jury, and I think he did, and that the trial Judge would not have been warranted in nonsuiting the plaintiff at the close of his case.

The next question is was the verdict one which the jury viewing all the evidence reasonably might have properly found, and I think it was, and that it ought not to be disturbed, but if disturbed I do not think we should take the extreme course of ignoring the finding of the jury, of depriving the plaintiff of his right to a trial of the case by a jury, and of taking the case into our own hands and dismissing the action.

Appeal allowed, ARMOUR, C.J.O., dissenting.

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[DIVISIONAL COURT.]

RE HAWKINS V. BATZOLD.

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Nov. 21.

Dec. 2.

Prohibition—Division Court—Order for Committal—Previous Order for Payment—Affidavit.

The plaintiff recovered judgment against the defendant in a Division Court action for a debt contracted before the passing of the Act, 61 Vict. ch. 15 (O.), and the defendant was at the hearing ordered to pay the amount of the judgment forthwith :—

Held, that the Court had jurisdiction under sub-sec. 5 of sec. 247 of the Division Courts Act, R.S.O. 1897 ch. 60, upon examination of the defendant on an after-judgment summons, to make an order for her committal, without a previous order for payment based upon such an examination and default thereunder.

Where it appears that a judgment debtor has been examined before the Judge, his order for committal must, on a motion for prohibition, be treated as a complete adjudication as to that which must be made to appear to warrant the making of an order under sub-sec. 5 of sec. 247.

Seemle, that if the affidavit of the plaintiff required by sec. 243 to be filed before the issue of the summons were not filed, it would not be open to the defendant, after appearing in obedience to the summons, to raise an objection to the jurisdiction on that ground ; and, the defect not appearing on the face of the proceedings, prohibition in such a case would not be granted.

Seemle, also, had the debt been contracted consequently to the passing of 61 Vict. ch. 15 (O), the result would have been the same.

MOTION by the defendant for prohibition to a division court.
The facts are stated in the judgment.

The motion was heard by MEREDITH C.J.C.P., in Chambers, on the 14th October, 1901.

W. J. Tremear, for the motion.

George C. Campbell, for the plaintiff.

November 21. MEREDITH, C.J.:—The motion is by the defendant for an order prohibiting the plaintiff in an action in the 3rd division court in the county of Elgin from further proceeding with the execution of the order or warrant of commitment issued therein.

The plaintiff recovered judgment on the 2nd May, 1899, for \$100 and costs, which the defendant was ordered to pay forthwith.

The judgment not having been satisfied, the plaintiff on the 16th August, 1901, procured a summons for the examination of the defendant, pursuant to sec. 243 of the Division Courts Act (R.S.O. 1897 ch. 60), to be issued, and the defendant, having

appeared in obedience to the summons, was examined on oath as to the matters as to which a party so summoned may be interrogated according to the provisions of the section, and the presiding Judge made an order that she should be committed to the common gaol of the county of Elgin for forty days, but directed that the warrant of commitment should not issue for ten days.

It appears from the certificate of the learned Judge that on the examination of the defendant he was satisfied that since the judgment was obtained against her she had sufficient means and ability to pay the debt and costs recovered against her without depriving herself or her family of the means of living, and that she had wilfully refused and neglected to pay the same, and the learned Judge has also certified that the defendant upon her examination did not make answer to his satisfaction touching some of the matters upon which she was examined and properly subject to examination.

On the 9th September, 1901, a warrant of commitment was issued in pursuance of the order. The warrant recites the recovery of the judgment, the issue of the summons for the examination of the defendant, that the defendant having duly appeared was examined, that it appeared on her examination that she incurred the debt which was the subject of the action, and had when and since the judgment was obtained against her sufficient means and ability to pay the debt without depriving herself or her family of the necessary means of living, and that she had wilfully refused and neglected to pay the same as ordered, and that thereupon it was ordered by the Judge that the defendant should be committed for the term of forty days to the common gaol of the county of Elgin, according to the form of the statute in that behalf, or until she should be discharged by due course of law; and the proceedings which the defendant is seeking by this motion to have prohibited are the proceedings to enforce this order of commitment.

The main contention of the applicant's counsel in support of the motion was, that there was no jurisdiction to make the order for the commitment, because, as he contended, such an order, according to the provisions of the Division Courts Act, cannot be made unless the judgment debtor, after a summons

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D. C. issued in pursuance of sec. 243, has been ordered to pay the
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RE HAWKINS doing so, and has again been summoned to shew cause why he
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This contention, in my opinion, is not well founded.

The authority of a Judge of the division court to order a judgment debtor to be committed for the causes which are recited in the warrant of commitment, is conferred by sub-sec. 5 of sec. 247, by which it is enacted as follows :

"5. If it appears to the satisfaction of the Judge that the party had when summoned, or, since the judgment was obtained against him, has had sufficient means and ability to pay the debt or damages, or costs recovered against him, either altogether or by the instalments which the Court in which the judgment was obtained has ordered, and if he refuses or neglected to pay the same at the time ordered, whether before or after the return of the summons, the Judge may, if he thinks fit, order such party to be committed to the common gaol of the county in which the party so summoned resides or carries on his business, for any period not exceeding forty days."*

Mr. Tremear relied especially on the words "to pay the debt . . . either altogether or by instalments which the Court in which the judgment was obtained has ordered, and if he refuses or neglected to pay the same at the time ordered," as shewing that after the recovery of the judgment there must have been an order to pay in one sum or by instalments the judgment debt or damages or costs, and the refusal or neglect of the party summoned to pay as ordered, to justify an order being made for his commitment under the sub-section; but that is not, I think, its meaning. The language just quoted has reference to the order for the making of which by the Judge provision is made in sec. 151, and the requirement of the sub-section is in this case met, because the Judge at the hearing made an order that the judgment debt and costs should be

* By 61 Vict. ch. 15, sec. 4(O.), the above sub-sec. 5 was repealed and the following substituted : " 5. If it appears that the judgment debtor had, when or since judgment was obtained against him, either altogether or by the instalments which the Court in which the judgment was obtained has ordered, without depriving himself or his family of the means of living, and that he has wilfully refused or neglected to pay the same as ordered, the Judge may," etc.

paid forthwith, and the defendant had therefore refused or neglected to pay as ordered, within the meaning of the subsection.

Notwithstanding the affidavit of the applicant in which she deposes that she answered all questions put to her by counsel for the plaintiff and the presiding Judge, and that from her examination it appeared that she had not since the judgment was obtained against her sufficient means and ability to pay the debt or costs recovered against her without depriving her and her family of the means of living, and that it did not appear that she wilfully refused or neglected to pay the judgment, and the other statements contained in her affidavit, I must, it appearing that the applicant was examined, treat the order of the learned Judge as a conclusive adjudication as to that which must be made to appear to warrant the making of an order under sub sec. 5 of sec. 247. Her examination is not before me on this application, and I am, therefore, not in a position to determine whether such a state of facts was shewn upon the examination as to preclude the inference being drawn from it which the learned Judge drew, even if I were at liberty to enter upon that inquiry, which I am not.

There is nothing to shew what facts were disclosed on the applicant's examination, and if I were at liberty to go behind the order of the learned Judge to ascertain whether any facts were shewn to warrant the making of it, the onus of shewing that no such facts were made to appear would rest upon the applicant, and that onus she has not satisfied,—her affidavit as to her view of the result of the examination being quite insufficient for that purpose.

I have dealt with the case as if the debt, as I understand to be the fact, was contracted before the Act 61 Vict. ch. 15 (O.) was passed, but if it be otherwise, and the provisions of secs. 3 and 4 of that Act be applicable, the motion equally fails, for the learned Judge found all that according to sec. 4 it was necessary to be made to appear to justify the making of the order of commitment.

I refer to *Colonial Bank of Australasia v. Willan* (1874), L.R. 5 P.C. 417; *Re Chisholm and Town of Oakville* (1885), 12 A.R. 225; *Re Long Point Co. v. Anderson* (1891), 18 A.R. 401; *Re Hyde v. Cavan* (1899), 31 O.R. 189.

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It was said upon the argument that the affidavit of the plaintiff, his solicitor or agent, required by sec. 243 to be filed before the issue of the summons was not filed, and it was contended that therefore all the proceedings against the defendant which resulted in the order for her committal being made were void.

It is sufficient for the purpose of disposing of this point adversely to the defendant to say that it is not made to appear on the material before me that the required affidavit was not filed before the issue of the summons.

The motion is dismissed with costs.

T. T. R.

The defendant appealed from the above judgment to a Divisional Court, and the appeal was argued on December 2, 1901, before BOYD, C., FERGUSON and ROBERTSON, JJ.

W. J. Tremear, for the appeal.
George C. Campbell, contra.

At the close of the argument the appeal was dismissed with costs.

G.A.B.

[IN CHAMBERS.]

PARENT V. COOK ET AL.

1901

Dec. 16.

Practice—Third Parties—Notice—Time—Enlarging—Rules 209, 353.

In an action for damages for trespasses to land and cutting down and removing timber and wood, the defendants by their statement of defence justified the acts complained of under agreements which, they alleged, authorized those acts, and to which the plaintiff's rights in the land were subject. The defendants served a notice upon third parties claiming indemnity or relief over in respect of all liability which the defendants might be under to the plaintiff by reason of acts done by them on the faith of representations made by the third parties, who had sold to the defendants the standing timber on the land and the right to remove it, representing that they had acquired title from the owners under whom the plaintiff derived his title:—

Held, that the third party notice was served too late (Rule 209), having been served not only after the time for the delivery of the defence, but after the pleadings were closed and the action entered for trial; and, under the circumstances, the time should not be enlarged by virtue of the provisions of Rule 353.

Semble, that it was not a proper case for contribution, indemnity, or relief over, under Rule 209.

AN appeal by George Niebergall & Son from an order of the senior local Judge of the county of Essex dismissing a motion by the appellants to set aside an order obtained *ex parte* by the defendants allowing them to serve a third party notice on the appellants. The facts appear in the judgment.

The appeal was heard by MEREDITH, C.J.C.P., in Chambers, on the 13th September, 1901.

J. H. Moss, for the appellants.

W. M. Douglas, K.C., for the respondents.

December 16. MEREDITH, C.J.:—George Niebergall & Son, who have been served with a third party notice pursuant to leave granted by the senior local Judge of the county of Essex, by an *ex parte* order made on the application of the respondents on the 19th day of August, 1901, move by way of appeal from an order of the same local Judge, dated the 9th September, 1901, dismissing their application to set aside the *ex parte* order.

The action is brought by the plaintiff, as owner of the northerly part of lot number 2 in the 12th concession of the township of Colchester, to recover damages from the respon-

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dents for trespasses to the land and cutting down and removing from it timber and wood, carrying away felled timber and wood and other waste and damage, all of which he alleges to have been done "against his will, and despite his prohibition."

The respondents by their statement of defence, besides denying the allegations contained in the statement of claim, justify the acts complained of under agreements which they allege to have authorized those acts and to which the plaintiff's rights in the land were, as they plead, subject.

Issue was joined on the 18th February, 1901, and the action was entered for trial at the Sandwich Spring jury sittings, but the trial was, on the 11th April, 1901, postponed, at the request of the plaintiff, to the next jury sittings at the same place.

On the 19th August, 1901, the *ex parte* order giving liberty to serve a third party notice upon the appellants and three other persons was made, and by it leave was given to the respondents, if necessary under the circumstances created by the order, to amend their statement of defence so far as the third parties were concerned, but without prejudice to the rights of the plaintiff in the action.

The case intended to be set up against the appellants, though the facts are very inartificially stated in the affidavit filed in support of the application and in the amended statement of defence, would appear to be, that they sold to the respondents the standing timber on the lands in question, and the right to remove it within a time not then expired, which they represented that they had acquired title to from the then owners of the land under whom the plaintiff derived his title, and the relief claimed against the appellants is indemnity or relief over in respect of all liability which the respondents may be under to the plaintiff by reason of the acts done by them on the faith of the representations alleged to have been made by the appellants.

The third party notice was filed on the 23rd August, 1901, and a copy of it and a copy of the order were served on the appellants on the following day.

On the 4th September, 1901, the amended statement of defence to which I have referred was filed.

The appellants thereupon moved to set aside the third party notice and the order of the 19th August, 1901, and it is, as I have said, against the order made on that motion that the appeal is brought.

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Two grounds are relied on by the appellants in support of their appeal: (1) that the third party notice was served too late, having been served not only after the time for the delivering of the statement of defence, but after the pleadings were closed and the action had been entered for trial; and (2) that the case made is not one for contribution, indemnity, or relief over under Con. Rule 209.

Consolidated Rule 209 in terms provides that a copy of the third party notice shall be filed, and a copy of it, together with a copy of the statement of claim, shall be served by the defendant within the time limited for the delivery of his defence.

The corresponding section of the English Rules provides that "unless otherwise ordered by the Court or a Judge" the third party notice shall be served within the time limited for delivering the defence of the defendant who issues it, and it was held in *Birmingham, etc., Land Co. v. London and North Western R.W. Co.* (1887), 56 L.T. 702, that the application for leave to serve a third party notice should be made promptly, and as a general rule within the time limited for defence, and at latest before the close of the pleadings.

If that is the construction to be placed on the English Rule, where express power is given to the Court or a Judge to direct that the notice may be served otherwise than within the time limited for delivery of the defence in the action, it is an *fortiori* case that under our Rule, which confers no such power, the application must be made and the notice served within that time.

I have not overlooked the provisions of Con. Rule 353, which empower the Court or a Judge to enlarge or abridge the time appointed by the Rules for doing any act or taking any proceeding, for, assuming the Rule to be applicable, the case referred to is an authority against enlarging the time in this case, and, even if that were not so, the learned local Judge did not exercise or assume to exercise the power conferred by this Rule, and the case is not, in my opinion, one in which I should,

Meredith, C.J. in the exercise of my discretion, enlarge the time allowed by
1901 the Rule for serving the notice.

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It is unnecessary to express an opinion as to whether the case made by the respondents is one coming within the provisions of Con. Rule 209, though I incline to think that it is not, for, assuming that it is, in my opinion nothing would be gained by bringing in the appellants as third parties. It is probable that the only question which would be determined at the trial, as well between the respondents and the appellants, as between the former and the plaintiff, would be, whether or not the acts complained of were unlawful or were lawfully done under the authority which the respondents plead as their justification for doing them. The measure of damages in the one case might be, depending on the facts as developed at the trial, very different from that in the other, and the respondents may protect themselves against the chance of having to risk a different conclusion being arrived at in an action brought by them against the appellants from that which may be reached in this action as to the existence of the right set up as a justification for the acts of which the plaintiff complains, by giving notice to the appellants of the action and offering to permit them to conduct the defence of it.

Upon the whole, I am of opinion that the appeal should be allowed and the order appealed from discharged, and instead thereof an order be made setting aside the third party notice as to the appellants and all subsequent proceedings had thereupon, and for the payment by the respondents to the appellants of the costs of the motion and of the appeal.

T. T. R.

[DIVISIONAL COURT.]

HUTTON V. JUSTIN ET AL.

D. C.

1901

Dec. 6.

Trustee—Lien—Abortive Sale—Foreclosure—Purchase by Trustee—Report on Sale—Certificate in Lieu of—Order—Terms.

The defendant having been declared a trustee, with a lien for advances, and the greater portion of the trust estate having been offered for sale, to satisfy the amount found due him, under the direction of the Court, and the sale having proved abortive :—

Held, that the defendant's position as a trustee debarred him from the ordinary remedy of foreclosure to which a mortgagee is entitled after an abortive sale. But, after a sale by auction has been tried in vain, the trustee is at liberty to make proposals on his own behalf, and the Court may, in its discretion, accept him as a purchaser of the estate.

Tennant v. Trenchard (1869), L.R. 4 Ch. 537, 546, 38 L.J. Ch. 661, followed.

Held, also, that it was not necessary to wait for the report on sale, but the motion might be based upon a certificate of the Master shewing that the sale had proved abortive, no ground for impeaching the sale proceedings being suggested.

Held, also, that the property offered for sale not being the whole of the trust estate, it would not, upon the evidence, be just to compel the defendant to accept it in satisfaction of his entire claim.

The defendant offering to submit to terms, an order was made providing that he should be allowed to purchase at the amount of his claim less \$250, in the event of \$17,500 not being realized by a sale by tender or private contract.

In 1892 the plaintiff assigned all his property to the defendant Justin, a creditor, for the general benefit of creditors, pursuant to the Assignments Act. The estate, which was heavily incumbered by mortgage, was carried on under the assignment, by direction of the creditors, and was not sold. In 1893 all the creditors, except the defendant Justin and the plaintiff's brother, were paid a dividend of 40 cents on the dollar, and released their claims. In 1894 an agreement was made between the plaintiff and her brother and the defendant Justin whereby the said defendant was to carry on the estate on the terms thereby agreed on, and was to have a lien for advances and for costs and commission in priority to the plaintiff's brother, who was also a creditor. The estate was carried on, and a number of parcels of land were sold and conveyed by the said defendant under the trusts of the assignment, with the approval of the plaintiff, but the largest part of the estate, consisting of an electric light plant, stores, and dwelling-house, was not sold. In 1899 the said defendant obtained from the Judge of a county court an order, under secs. 17 and 18 of the

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Assignments Act (R.S.O. 1897 ch. 147), authorizing the sale of the last mentioned portion of the estate. It was put up for sale, and was sold, and the sale was confirmed by the county Judge. The plaintiff then brought this action to have it declared that the defendant was a trustee for her, and for an account, and other relief. By the judgment of the Court of Appeal (17th September, 1900) it was declared that the defendant Justin had ceased to be an assignee under the statute, and had become a trustee, with a lien for advances, etc., but without a power of sale; and the sale was set aside; the accounts of the said defendant were directed to be taken; and it was adjudged that he should recover from the plaintiff any balance which the estate should be insufficient to satisfy; and further directions were reserved. The accounts were duly taken, and, on further directions, the Court ordered that the estate be sold. The property was put up for sale in parcels at auction, but did not realize the amount of the reserved bids fixed by the Master, the total amounts bid for the several parcels amounting to much less than the amount of the incumbrances against the estate, as found by the Master, which incumbrances had been assumed by the defendant Justin.

The defendant Justin moved in Chambers for an order of foreclosure or for such directions or order as the Court might consider proper; filing the Master's certificate as to the result of the sale. Meredith, C.J.C.P., heard the motion and ordered that the property be put up for sale by tender *en bloc*, and that, if \$17,500 should not be realized, the defendant should have leave to purchase at that price.

The plaintiff appealed, and her appeal was heard by a Divisional Court composed of MOSS, J.A., and FALCONBRIDGE, C.J.K.B., on the 8th October, 1901.

W. H. McFadden, for the plaintiff. The motion was premature. The defendant Justin had the conduct of the sale, which proved abortive, and no further attempt was made to sell under the direction of the Master. No report has been made as to the result of the attempt to sell. A certificate was given pending the motion, but a report is the proper proceeding. A trustee with a lien is not entitled to foreclosure. This

order is worse for the plaintiff than foreclosure. The defendant Justin's claim is about \$18,500 or more, and he is now to be allowed the purchase for \$17,500. The plaintiff takes the position that the property should be put up for sale again under the Master's direction, in separate parcels.

B. F. Justin, one of the defendants, in person. *Tennant v. Trenchard* (1869), L.R. 4 Ch. 537 (*S.C.* (1872), 20 W.R. 785), prevented my getting an order for leave to bid at the sale, and it is authority for the order made by the Chief Justice: Daniell's Ch. Prac., 6th ed., pp. 1073-4. I am ready to submit to whatever terms are thought just.

December 6. The judgment of the Court was delivered by Moss, J.A.:—The defendant's position as a trustee debars him from the ordinary remedy of foreclosure, which a mortgagee is entitled to after an abortive sale. But, after a sale by auction has been tried in vain, the trustee is at liberty to make proposals on his own behalf, and the Court may, in its discretion, accept him as a purchaser of the estate: *Tennant v. Trenchard*, L.R. 4 Ch. 537, 546, 38 L.J. Ch. 661; see also *S.C.*, 20 W.R. 785, where the case was again dealt with. This is, in effect, what the learned Chief Justice has done by the order complained of.

The plaintiff objected that the motion was premature, inasmuch as the report on sale had not been made, and that the Court should not accept the Master's certificate of the sale having proved abortive.

In *Girdlestone v. Gunn*, 1 Ch. Ch. 212, the Master's certificate appears to have been received as proof that the sale had proved abortive for want of bidders. No ground for impeaching the sale proceedings was suggested, and there appears to be no good reason why the defendant should have been put to the additional expense and delay of obtaining a report before coming to the Court with his proposal. Indeed, it was his duty to adopt the most inexpensive course: *Odell v. Doty*, 1 Ch. Ch. 207.

It was also objected that the effect of the order was to give the defendant the estate at a sum of \$17,500, thus leaving a considerable balance due to him in respect of his claim, which would place him in a better position than if a foreclosure was granted.

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The property embraced in the order is not the whole of the trust estate, and, upon the evidence, it would not be just to compel the defendant to accept that which was put up for sale in satisfaction of his entire claim. Upon the argument the defendant offered to submit to such terms as might be thought just, and, under all the circumstances, if the defendant desires to become the purchaser of the property affected by the order, he should be permitted to do so, but not precisely upon the terms of the order. We think that, upon the defendant now agreeing that in the event of \$17,500 not being realized by a sale by tender or private contract he will become the purchaser of the trust estate mentioned in the order at a sum equal to the amount of his claim when finally adjusted by the Master at Brampton less the sum of \$250, the order should be varied to that extent, and that, with such variation, the appeal should be dismissed. The defendant's costs of the appeal are to be added to his claim. To avoid delay and expense, the order need not be drawn up until after the Master has certified his findings, which may then be embodied in the order.

E. B. B.

[Leave to appeal to the Court of Appeal was refused by OSLER, J.A., on the 22nd January, 1902.]

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THE CORPORATION OF THE CITY OF TORONTO.

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Oct. 22.

Assessment and Taxes—Distress—"Owner"—Agreement for Purchase—Part Performance—Local Improvement Rates—Abandonment of Distress—R.S.O. 1897, ch. 224, secs. 24, 60, 129, 133-135.

A purchaser who has gone into possession and made part payment of the purchase money under an agreement for the sale of land unexecuted by the vendor, which provides for payment by the purchaser of the taxes, rates and assessments rated or charged from the date of the agreement is an "owner" within the provisions of sec. 135 of the Assessment Act, and is liable for the taxes accruing during his occupancy, although they may have been assessed against a former owner. Local improvement rates grouped with other taxes under the Assessment Act, and included in the collector's roll, are "taxes" in its broad sense and may be collected or realized by uniform statutory process.

A warrant of distress specifying two bailiffs is unobjectionable.

Upon the facts of this case where one bailiff had rightly entered and seized and had afterwards withdrawn by reason of the misstatements of the owner, it was held competent for another bailiff to return forthwith and continue the first lawful taking.

McDougall v. McMillan (1873), 25 C.P. 75 at p. 92 followed.

THIS was an action brought by one J. M. Sawers against the corporation of the city of Toronto for illegal distress for taxes, under the circumstances set out in the judgment and was tried at Toronto on September 19th, 20th and 23rd, 1901, before BOYD, C., without a jury.

J. W. McCullough, for the plaintiff. The plaintiff was not the "owner" of the premises. It is true he was in possession under an alleged agreement for purchase, which, however, was not signed by the company mortgagee, and was not enforceable by the plaintiff, and did not constitute him a purchaser but a mere tenant at will, and he was not assessed as owner or tenant, or in fact in any way. The warrant names one McIntyre as the "owner," and the defendants cannot give evidence to shew that the plaintiff was the owner: *Hoye v. Bush* (1840), 1 M. & G. 775; *Parton v. Williams* (1820), 3 B. & A. 330; *Cardwell v. Lucas* (1836), 2 M. & W. 111; *In re Flatt and the United Counties of Prescott and Russell* (1890), 18 A.R. 1; *The Corporation of the Township of McKillop v. The Corporation of the Township of Logan* (1899), 29 S.C.R. 702. The

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mortgagor was entitled to redeem, and was in law the "owner," and the agreement under which the plaintiff was in possession was not binding; but, even if it had been binding, the plaintiff was not liable for the taxes which were "assessed" during the previous year: *Macnaughton v. Wigg* (1874), 35 U.C.R. 111. Plaintiff covenanted to pay only the taxes assessed "after" September, 1898, and the taxes distrained for were assessed in June, 1898. He was not liable for the local improvement rates which were assessed with the other rates, and so made the whole assessment irregular: *Black on Tax Titles*, 2nd ed., par. 230. "Owner" is the equivalent of "freeholder": R.S.O. 1897, ch. 224, sec. 24. By sec. 353 of ch. 223 only a "freeholder" is entitled to vote, and why should a man be called upon to assume the burden of taxpaying unless he has the privilege of voting? The warrant was directed to two bailiffs, and was irregular: R.S.O. 1897, ch. 224, sec. 135; *Regina v. Ireland* (1899), 31 O.R. 267. The first entry by the bailiff was "abandoned," and the second entry, after sundown and by force, was unlawful: *The American Concentrated Must Corporation v. Hendry* (1893), 62 L.J.Q.B. 388. The distress was not made until the year 1901, and there were plenty of goods on the premises during the years 1899 and 1900, and the taxes should have been collected then. The onus of proving a strict compliance with the statute is upon the defendants: *O'Brien v. Cogswell* (1890), 17 S.C.R. at p. 438; *Cogswell v. Holland* (1888), 21 Nova Scotia at p. 167. The municipality is liable for the acts of the collector: *Nicholls v. Cumming* (1877), 1 S.C.R. at p. 421. The damages should be substantial: *The Toronto Railway Company v. Grinsted* (1895), 24 S.C.R. 570; *Wilkinson v. Downton*, [1897] 2 Q.B. 57; *Lloyd v. Sugg & Co.*, [1900] 1 Q.B. at p. 487.

Fullerton, K.C., and *W. C. Chisholm*, for the defendants. The agreement was a perfectly valid one between the plaintiff and the mortgagee company who had been in possession, and as a purchaser he was liable for the taxes: R.S.O. 1897, ch. 224, sec. 135. Local improvement rates are an incumbrance and the owner is liable for them: 55 Vict. ch. 42, sec. 624a (6), now R.S.O. 1897, ch. 223, sec. 681. The service of a tax bill is a demand: R.S.O. 1897, ch. 224, sec. 134 (1), and besides the

plaintiff had paid the first instalment. There is no estoppel merely because the mortgagor was named in the warrant as owner, and the defendants are at liberty to shew that the plaintiff was the owner when the distress was made. The plaintiff was a purchaser and a tenant as well: *York v. Township of Osgoode* (1892), 24 O.R. 12; (1894), 21 A.R. 168, 24 S.C.R. 282. If he is more than a tenant he is owner: Assessment Act, sec. 135. The bailiff left the premises under a wrong impression, but there was no abandonment of the distress and his return was quite proper: *Wollaston v. Stafford* (1854), 15 C.B. 278; *Bannister v. Hyde* (1860), 2 El. & El. 627; *Swann v. The Earl of Falmouth* (1828), 8 B. & C. 456. Although the time for return of the collector's roll had expired at the time of the seizure, the collector still having the roll in his hands, was entitled to issue a warrant: *Newberry v. Stephens* (1857), 16 U.C.R. 65; *Lewis v. Brady* (1889), 17 O.R. 377. The collector is not an officer of the corporation: *McSorley v. The Mayor, etc., of the City of St. John* (1882), 6 S.C.R. 531; *Seymour v. The Township of Maidstone* (1897), 24 A.R. 370; *Wallace v. The City of Menasha* (1880), 48 Wis. 79; Cooley on Taxation, p. 566. The rule as to distress after sundown applies only to cases of distress for rent for the reasons indicated in the cases: *Tutton v. Darke*; *Nixon v. Freeman* (1860), 5 H. & N. 647.

McCullough, in reply, referred to *Pugh v. London and Brighton and South Coast R.W. Co.*, [1896] 2 Q.B. 248; *Caston v. The Corporation of the City of Toronto* (1898), 30 O.R. at p. 25; *Tracey v. Reed* (1889), 38 Fed. R. 69.

October 22. BOYD, C.:—The meritorious question involved in this lengthened controversy is whether the plaintiff was or was not "owner" of the assessed premises within the meaning of that term as used in the Assessment Act, R.S.O. 1897, ch. 224.

There is no definition given of the word and it is notoriously one of very flexible meaning, taking its colouring very much from the context or the intention of the parties (where there are mutual dealings).

In the Assessment Act it is sometimes used in contrast with "tenant or occupant": section 24; but again, it may be that the

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occupant is also the owner. That is, I think, the present case.

The plaintiff is more than tenant or occupant. He took possession under an agreement to purchase the fee from the mortgagees exercising upon default their power of sale, and if more than tenant he is to be classed as *owner* within the provisions of section 135 of the Act.

Upon the facts it is proved that he became purchaser from the Canada Permanent Loan and Savings Company in September, 1898, and so was let into possession and remained in possession till the agreement was cancelled by that company for default in keeping up the payments on his part on the 7th of May, 1901.

The arrears of taxes now in question were for the second and third instalments of the year 1899; during the whole of that year the plaintiff was in possession as purchaser, occupant and owner, and was the proper and only person to pay the year's taxes. For he had stipulated with the company that he would pay the taxes, rates and assessments wherewith the land should be rated or charged from and after the 1st of September, 1898.

True it is, the contract is not under the seal of the company, but there was part performance sufficient to entitle the plaintiff to make good the contract against the company, and a long series of payments was made by him as purchaser beginning in September, 1898, and ending in February, 1901, while so in possession.

The plaintiff seeks to shew that there was a change in the contract by which his occupation was reduced to that of a mere tenant, but this, I find, entirely fails in proof.

Of cases cited on this head of law, I think *York v. Township of Osgoode*, 21 A.R. at p. 173, affirmed, 24 S.C.R. 282, is more relevant than *In re Flatt and the United Counties of Prescott and Russell*, 18 A.R. 1, though the judgment of the dissenting Judge in the last is valuable as shewing the position of the plaintiff as purchaser.

But more closely in point is the holding in the case of the then Tax Acts that the term "owner" is applicable to the person who is in possession claiming title as purchaser: *McDougall v. McMillan* (1873), 25 C.P. 75 at p. 92.

Printed notice of the taxes in question was duly served upon or received by the plaintiff then in possession, and he made payment of the first instalment on the 16th of August, 1899, but made default as to the other instalments.

The assessment was made in 1898, as it lawfully might, as a basis for the tax in 1899. At the date of that assessment McIntyre was the owner as mortgagor and thus appears as owner in the collector's roll for 1899, but meanwhile the ownership has vested in the plaintiff, who is made liable by the statute as such though not in name assessed: section 135 (1) 3; and it is plain from *York v. Township of Osgoode* that no estoppel arises to prevent the real ownership being discovered.

"Local improvement" rates are grouped with other taxes: ch. 224, sec. 60, and these local rates are included in the collector's roll by sec. 129. Thereafter when the collector's duties were defined and the manner of collection is provided for by distress and these local rates are blended with and not distinguished from the other assessments and are, therefore, to be deemed "taxes" in its broad sense which are to be collected or realized by uniform statutory process: sections 133-135.

That the warrant specifies two bailiffs is no objection; no warrant need be drawn up, and anyone acting as bailiff may be authenticated as such by subsequent recognition on the part of the collector.

Many other formal objections were taken which do not appear to be of weight, having regard to the documentary evidence given of the action of the city authorities.

This clears the way to consider the second main ground urged on behalf of the plaintiff, that if the plaintiff's goods on the premises were in law liable yet the distress was wrongfully conducted under the common law.

It is said there was one, and the first entry, which was abandoned, and the second entry was after sundown and forcibly made.

Upon the facts I think it proved that the first entry and seizure was rightly made and that the bailiff was induced to withdraw upon the statement of the plaintiff that he was not the owner but only as tenant. He produced what he calls a receipt for rent, and believing it to be such, the bailiff retired

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to consult the other bailiff, Stevenson, who was more conversant with the character in which the plaintiff occupied the premises. Stevenson thereupon returned and resumed possession, after which an altercation arose between him and the plaintiff with threats and menaces and mutual assaults of a more or less serious character.

The so-called receipt for rent was for \$15 paid on the purchase by plaintiff, but, as explained by the officers of the company, it was drawn up by mistake on a wrong printed form as if it were in payment of money advanced to a mortgagor.

By means of this paper, not understood by the bailiff, but used by the plaintiff as an argument that he was only a tenant of the place, the bailiff was induced to withdraw for the time being, but the misstatement having been discovered by the chief bailiff, Stevenson, it was competent for him forthwith to return and to continue the first lawful taking: *Wollaston v. Stafford*, 15 C.B. 278.

I should be disposed to hold, upon all the facts of the case, that there is no sufficient evidence of voluntary abandonment by the first bailiff quitting the house to get advice from the superior bailiff: *Bannister v. Hyde*, 2 El. & El. 627.

I need not consider whether the door inside the vestibule is to be regarded as the outer or inner door, as I am against the view that the seizure was abandoned.

As to the alleged assault, I find that one party was as much to blame as the other.

The net result is that the action fails, and it should be dismissed with costs.

G. A. B.

YOUNG V. DENIKE.

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Nov. 11.

Will—Separate Gifts to Parent and Child—Defective Title—Lien for Improvements and Purchase Moneys—Occupation Rent.

A testator, by will made before the 1st January, 1874, devised his farm "To J. H. for the term of his natural life; after his death to his children in equal shares; should he die without a child living at the time of his death then to G. for his life and after his death to his children in equal shares; if G. should die without a child living at his death then," etc., etc. :—

Held, that there were two gifts, one to J. H. for life, and the other to his children in equal shares, which carried the remainder in fee to the child or children subject to be divested if he died without a child living at his death.

Under the circumstances of this case where the defendants had taken possession under an agreement to purchase in fee, with covenants for good title free from encumbrances, from the plaintiff who claimed through J. H. under the above devise, the defendants were declared to have a lien on the land for lasting improvements made and purchase moneys paid after being charged with a fair occupation rent.

THIS was an action brought by Hannah A. Young against Susan M. Denike and her husband to recover possession of a part of the north-westerly half of lot number thirty-eight in the first concession south-west of Green Point in the township of Sophiasburg in the county of Prince Edward.

The defendant Susan M. Denike had by an agreement in writing, dated September 14th, 1898, agreed to purchase the property from the plaintiff and had entered into possession on or about November 18th, 1898, making payments on account of the purchase money and certain improvements and cultivating it.

The plaintiff claimed title through a mortgage made by one James Hurlbert Rowe and his wife who claimed under the will of one James Rowe.

In 1887 the property had been sold in an action upon this mortgage, and after several conveyances came into the hands of the plaintiff. The will of James Rowe which was in question was made before the 1st of January, 1874, and contained the following clause :—

"I give and devise to my grandson James Hurlbert" [describing the property] "for the term of his natural life. After his death I devise the same to his children lawfully begotten in equal shares; should he die without a child living at the time of his death, then I devise the said land to my said son George for the term of his natural life, and after his death to his children

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lawfully begotten in equal shares. If said George should die without a child living at the time of his death then I devise," etc.

The testator James Rowe died on the 4th of February, 1874, and the devisee James Hurlbert Rowe, who was still alive married about two years afterwards, and had a daughter living.

The plaintiff alleged that she was the owner in fee simple, and claimed payment of the purchase money or possession.

The defendants set up want of or defect in title in the plaintiff, and counter-claimed for improvements, repayment of purchase money, etc.

The action was tried on October 30th, 1901, at Picton, before BOYD, C., without a jury.

R. C. Clute, K.C., and *N. Gilbert*, for plaintiffs. The defendants in possession are estopped from denying the plaintiff's title: *Roscoe's Nisi Prius*, 17th ed., 991; *Dalton v. Fitzgerald*, [1897] 2 Ch. 86, which followed *Board v. Board* (1873), L.R. 9 Q.B. 48. The plaintiff is entitled to recover possession: *Doe d. Bord v. Burton* (1851), 16 Q.B. 807; *Farrelly v. Robins*, [1869] I.R. 3 C.L. 284. The defendant is not entitled to both the purchase money and the possession of the land: *Fry on Specific Performance*, 3rd ed., pars. 1399, 1457, 1465; *Garrick, v. Earl Camden* (1790), 2 Cox. 231; *Cuddon v. Tite* (1858), 1 Giff. 395; *Smith v. Lloyd* (1815), 1 Mad. 83; *Smith v. Jackson* (1816), 1 Mad. 618; *Clarke v. Wilson* (1808, 15 Ves. 316; *Wickham v. Evered* (1819), 4 Mad. 53; *Tindal v. Cobham* (1835), 2 My. & K. 385; *King v. King* (1833), 1 My. & K. 442; *Curling v. Austin* (1862), 2 Dr. & Sm. 129; *Greenwood v. Turner*, [1891] 2 Ch. 144; *Gibson v. Clarke* (1813), 1 V. & B. 500; *Armstrong v. Auger* (1891), 21 O.R. at p. 103.

Shelley's Case, 1 Co. 93b, and *Wild's Case*, 6 Co. 16b, were also cited, and *Evans v. King* (1894), 21 A.R. 519; and *Grant v. Squire* (1901), 2 O.L.R. 131, referred to.

P. C. Macnee, for the defendants. The plaintiff covenanted to make out a title in fee simple, and there was no provision for a rescission of the contract of sale. The contract specially

provided for the taking of possession and there was no waiver by payments or otherwise: *Dixon v. Astley* (1816), 1 Mer. 133; *Stevens v. Guppy* (1826), 3 Russ. 171; *Darby v. Greenlees* (1865), 11 Gr. at p. 353; *Mitcheltree v. Irwin* (1867), 13 Gr. at pp. 540, 541; *Simmers v. Erb* (1874), 21 Gr. 289; *O'Connor v. Beatty* (1878), 2 A.R. at p. 504. The defendants are not bound to pay the purchase money into Court: *Cameron v. Carter* (1885), 9 O.R. 426; *Ellwood v. Pierce* (1878), 7 P.R. 427; *McDermid v. McDermid* (1879), 8 P.R. 28. Only a small portion, if any, of the purchase money is overdue, and there is no acceleration clause. The defendants are entitled to a good title. The will of James Rowe and codicil are dated prior to the passing of the Wills Act 1873, 36 Vict. ch. 20, sec. 26 (O.), making provision regarding death without issue. The rule in *Wild's Case* does not apply, the devisee having no children at the time of the devise and might never have any; that rule applies to a gift to a parent and child together. Here the father has the immediate estate and the children the remainder contingent on surviving him: Jarman on Wills, 5th ed., p. 1235. Nor does the rule in *Shelley's Case* apply, as the testator did not use the words "heirs" or "issue" or "heirs of the body" which would have created a prior estate of freehold with a subsequent limitation to heirs, either special or general, in the same instrument. "Issue" means descendants of every degree: Jarman, p. 946. Here the limitation is less extensive, so the word "children" is a word of purchase not limitation: Jarman, p. 1000: *Bowen v. Lewis* (1884), 9 App. Cas. 907; *Chandler v. Gibson* (1901), 2 O.L.R. 442. On the question of lien for improvements I refer to *Chandler v. Gibson*, 2 O.L.R. 442; *O'Grady v. McCaffray* (1882), 2 O.R. 309; *Russell v. Romanes* (1879), 3 A.R. 635; *McGregor v. McGregor* (1880), 27 Gr. at p. 476; *King v. Evans* (1895), 24 S.C.R. 356; *McKibbin v. Williams* (1897), 24 A.R. 122.

Clute, in reply.

November 11. BOYD, C.:—Devise to James Hurlbert of land for the term of his natural life; after his death to his children in equal shares; should he die without a child living at the time of his death then to George for his life, and after

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his death to his children in equal shares ; if George should die without a child living at his death then, etc., etc.

The first devisee James is now living aged 50, and has one child, a daughter, born after the death of the testator.

The question is what title has James in the land ?

I think that this is governed neither by *Wild's Case* nor *Shelley's Case*, nor as was argued by a combination of them. There are plainly two gifts, one to James for life and the other to his children in equal shares, which carries the remainder in fee to the child or children, subject to be divested if he dies with a child living at his death : see *Jeffrey v. Heywood* (1818), 4 Mad. at p. 403, and *Smith v. Smith* (1885), 8 O.R. at p. 678.

The plaintiff holds, therefore, no more than an estate for the life of James and cannot make title under his contract.

Both parties agree and ask that failing title the contract may be rescinded, and that they be restored to their former position. The purchasers (defendants) will, therefore, be ordered to give up possession to the plaintiff, and will have a lien on the place for whatever may be found coming to them for lasting improvements made, and purchase moneys paid to the plaintiff after being charged with a fair occupation rent.

Costs reserved till the accounts are taken by the Master to whom it is referred if the parties cannot agree.

G. A. B.

[DIVISIONAL COURT.]

RE TORONTO PUBLIC SCHOOL BOARD AND CITY OF TORONTO.

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Dec. 2.

Public Schools—Expenditure—Annual Estimates—Revision—Powers of Municipal Council—Salaries of Teachers—Contracts with—Repairs—Furniture—Discretion—Medals—Liabilities of Previous Year—"Miscellaneous"—Rent of School Rooms.

Upon an application by the school board for a mandamus to the city corporation to levy certain sums of money alleged by the board to be required for school purposes for the year 1901, it appeared that the council of the corporation had received the estimates of the board of the amounts required, and had struck off certain items in whole, and reduced others, upon various grounds.

At the end of the year 1900 all the teachers who were engaged or re-engaged for 1901 signed a contract in writing with, and executed under the seal of, the board, by which the teachers were employed by the board "in the school and at the yearly salary set opposite his or her name respectively . . . or at such salary and in such school or division of the same as they may from time to time appoint, for the term of one year, beginning on the 1st January, 1901, and ending on the 31st December, 1901;" and the board further thereby agreed "that they . . . would pay such salary to the said teacher monthly;" and it was further agreed that the board and the teacher might, at their option respectively, terminate the engagement by giving notice in the manner provided by the school regulations. The salary payable to each teacher under this agreement was set opposite his or her name in a schedule attached to it. In March, 1901, the board passed a resolution increasing the salaries of all the teachers who had been employed during 1900, the result being that the aggregate salaries of the teachers for 1901 who had signed the agreement at the end of 1900 were increased by about \$41,000 beyond the amount payable to them under the terms of that agreement. The city corporation refused the request of the board to levy the sum required to pay these additions to the salaries of the teachers, upon the ground that they were voluntary and unauthorized:—

Held, that it is only when it is made to appear that the expenditure would be clearly an illegal one, or *ultra vires* the school board, that the council is justified in refusing to raise the sum required by the board. It was by no means clear that, after the resolution of March, 1901, the board was not under a legal obligation to pay the larger salaries; and it was not intended that the council should inquire into the validity of contracts entered into in good faith between the board and teachers, and treated and acted on by them as valid. All that the council has a right to ask is, that what the Legislature has termed an "estimate" shall shew that the board has in good faith estimated the amounts required to meet the expenses of the schools for the current year, and the purposes for which the sums are required, in such a way as to indicate that they are purposes for which the board has the right to expend the money of the ratepayers, and, when that has been done, the duty is imposed upon the council of raising by taxation (except in the special case for which provision is made by sec. 74 of the Public Schools Act, 1 Edw. VII. ch. 39 (O.)) the sums required according to the estimate.

Semble, that, even if an action by a teacher for salary on the basis of the March resolution would fail if it were set up in answer that the agreement sought to be enforced was not in writing, signed by the parties to it, and under the seal of the corporation, the board could not be compelled to set up such a defence, and if they refused to do so and wished to pay

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the salary in accordance with the resolution, the council would not be justified in refusing to provide the money.

2. For repairs, the estimate submitted by the board was: "Ordinary yearly repairs and alterations to school property under the Act, based on expenditure of the past ten years, \$25,000:"—

Held, a sufficient estimate to cast upon the council the duty of levying and collecting the whole \$25,000; more especially as it was supplemented, upon a request being made for further information, by a detailed statement of repairs to be made, shewing the nature of the repairs to be made on each building, but not the probable cost of these repairs separately; the word "alterations" used in the estimate might have covered additions to school-houses (sec. 76, sub-sec. 1), but the detailed statement shewed that repairs only were intended.

3. Another item was: "Dais and railings in board rooms, and counters, partitions, screens, etc., in office, \$6,000—to carry out plans approved by the city council of last year, for which they included the item in a money by-law." The board rented from the city corporation a part of a building for use as a board room and for offices, and the \$6,000 was for the fittings and furnishings thereof:—

Held, having regard to the fact that plans and an estimate of the cost were approved by the council of 1900, and a by-law in that year provisionally passed and submitted to the electors for borrowing \$6,000 to defray that cost, that the estimate was sufficient.

Held, also, that it did not provide for expenditure of the class dealt with by sub-sec. 1 of sec. 76.

Held, also, that, although there is no direct authority in the Public Schools Act for the expenditure of money in furnishing board rooms and offices, such authority may be implied from secs. 56 and 65 of that Act, and sec. 8 (25) of the Interpretation Act. R.S.O. 1897 ch. 1.

Held, also, that neither the council nor the Court could deal with the question whether the amount was extravagant, nor, where there was good faith on the part of the board, call upon it to give reasons for the exercise of its discretion.

4. *Held*, that an item of \$50, part of the sum asked for medals and certificates for pupils, should not have been disallowed by the council. It is within the general powers of school boards to provide such recognitions of standing and merit, at the expense of the ratepayers.

5. *Held*, that items intended to provide for liabilities incurred in 1900, the payment of which was deliberately held over until 1901, were properly disallowed by the council as not forming part of the expenses of the schools under the charge of the board for 1901.

6. Under the head of "miscellaneous, based on the expenditure of past years," the board asked for \$1,000. The council asked for no details of this, but struck it out *in toto*:—

Held, that the estimate was sufficient, and that the item should not have been struck off without particulars being asked for, when they were asked for in other cases.

7. The council struck off \$4,250 from an estimate of \$11,750 for new furniture in new school rooms, and renewing the furniture in certain existing school rooms where it was worn out, and for repairs to old furniture:—

Held, that this estimate, with the details given at the request of the council, was sufficient, and should have been accepted. The cost of the furniture of a school room is not part of the cost of the erection of a school house under sec. 75 of the Act.

8. *Held*, that the item of \$220 for rent of school rooms to be used by the children taken care of by "The Girls' Home" should not have been struck out: sec. 65, sub-secs. 3 and 4, and sec. 67.

APPLICATION by the school board for a mandamus to the corporation of the city of Toronto to levy certain sums of money alleged by the school board to be required for school

purposes for the year 1901. The city council had received the estimates of the school board of the amounts required, and had struck off certain items in whole, and had reduced certain others, upon various grounds, which appear in the judgments below. After having demanded that the city council should levy the remainder of the sums mentioned in the estimates and having received a refusal to do so, the school board made the present application.

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It was heard by STREET, J., in Chambers, on the 23rd September, 1901.

F. E. Hodgins, for the applicants.

J. S. Fullerton, K.C., for the city corporation.

October 19. STREET, J.:—The largest item struck out of the estimates of the school board by the city council was a sum assumed to be \$43,000, but which, I think, appears to be some \$41,000 odd, for additions made to the salaries of the teachers in the schools for the year 1900. The circumstances are as follows: At the end of the year 1900 all the teachers who were engaged or re-engaged for the year 1901 were required to sign, and did sign, a contract in writing with the school corporation, which was also duly executed under the seal of the school board, by which the teachers were employed by the school board “in the school and at the yearly salary set opposite his and her name respectively . . . or at such salary and in such school or division of the same as they may from time to time appoint, for the term of one year beginning on the 1st January, 1901, and ending on the 31st December, 1901;” and the school board further thereby agreed “that they and their successors in office would pay such salary to the said teacher monthly;” and it was further agreed that the board and the teachers might, at their option respectively, terminate the engagement by giving notice in the manner provided by the school regulations. The salary payable to each teacher under this agreement is set opposite his or her name in the schedule attached to it.

During the months of January and February, 1901, various petitions were presented to the school board by the teachers

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who had signed the agreement asking that their salaries should be increased. On the 6th March, 1901, the school board passed a resolution increasing the salaries of all the teachers who had been employed during the year 1900, the result being that the aggregate salaries of the teachers for the year 1901 who had signed the agreement at the end of 1900, were increased by about \$41,000 beyond the amount payable to them under the terms of that agreement.

The city refused the request of the school board to levy the sum required to pay these additions to the salaries of the teachers, upon the ground that they were voluntary and unauthorized.

By sec. 81 of ch. 39 1 Edw. VII. (O.), "all agreements between trustees and teachers shall be in writing signed by the parties thereto and shall be sealed with the seal of the corporation."

By sec. 65 of the same Act, sub-sec. 5, it is declared to be the duty of the trustees to determine the teachers to be employed and their remuneration.

By sub-sec. 9 of sec. 65 the trustees are required to submit to the municipal council on or before the 1st day of August, or at such time as may be required by the municipal council, an estimate of the expenses of the schools under their charge for the current year; and by sec. 71 the council of the municipality are required to levy and collect upon the taxable property of the municipality such sums as may be required by the trustees for school purposes.

In my opinion, the contention of the city upon this portion of the claim is one which they are entitled to make, and the one which must be sustained. They are entitled to scrutinize the estimates laid before them by the school board, and to refuse to levy any sum contained in them which is not payable according to law. The trustees are required to sign and seal all agreements with the teachers: a mere resolution as to salaries is not binding upon them: the agreement signed by the teachers is binding upon the teachers. Therefore, when the school board estimates are scrutinized, it is found that the only agreement binding upon them with regard to salaries is that contained in the agreement into which they and the teachers have entered. It would be competent for the school board, for

all that appears to the contrary, to rescind at any time the resolution to increase the salaries, because the resolution is not a contract with the teachers. It would, no doubt, have been competent for the school board to have entered into a new contract with the teachers for the payment of the increased salaries, but they have not done this, and the increase is in the shape of a mere prospective voluntary payment which they may pay or withhold at their pleasure. It is as if they had asked for this \$41,000 in order that they might present it to the teachers as a bonus over and above the salaries for which they had agreed to do the work of their positions.

I can only deal with the strict rights of the parties: the sum in question is a very considerable one, and the city council, in my opinion, were not obliged to levy it under the circumstances. The city council seem to have reduced the item for salaries by a larger sum than their contention and my judgment upon it warrant: they have taken off some \$43,000, instead of about \$41,000, but the proper amount can readily be ascertained.

Another large item made up of several sums is objected to as not being "expenses of the schools for the current year," within the meaning of sub-sec. 9 of sec. 65 of ch. 39, 1 Edw. VII. It is in fact admitted to be a part of the expenses of a previous year or years, deliberately withheld by the school board of last year from their estimates of last year.

The items making it up are as follows:—

A debt of \$593.77 incurred for water used in the schools, which should have been included in the estimates for 1900, but was held over, as is alleged, by the school board at the request of the board of control of the city council.

A debt of \$279.89 incurred for gas and held back from the 1900 estimates under the same circumstances.

A debt of \$5,200 incurred for fuel and held back from the 1900 estimates under the same circumstances.

An overdraft of \$2,138.88 expended for text books and supplies included in the estimates for 1900, but struck off as alleged in that year by the board of control, with the assent of the school board. Mr. Wilkinson, the secretary-treasurer of the school board, in his evidence says that the items so held over amount, he thinks, to \$20,000, but I can only find the four items above, which amount in all to \$8,212.54.

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It appears from the evidence that these sums are not expenses of the schools for the current year, but expenses of the schools for a former year, which were deliberately left unprovided for in the estimates of the year to which they belonged, with the intention of having them included in the estimates of a future year to which they did not belong. It was denied upon the argument before me that the board of control had made any request that these sums should be held over from any former year, and no evidence was produced in support of the statement. But the request of the board of control, if made, was one which was illegal, and the school board were acting illegally in attempting to make any such arrangement. The plain intention of the School Act is that the school board shall ask in each year for money sufficient to carry on the schools during that year, and that, upon proper estimates of the sum required being laid before them, the city council shall provide the amount so properly required. But the funds for each year's expenses are to be provided in that year, and the school boards are not entitled either to exceed the estimates or to run into debt. The system which the school board here states it adopted of reducing their estimates for one year, with the intention of incurring a debt which was to be added to the expenses of the following year, is essentially wrong and vicious in principle, and cannot be supported. The only money which the school board has to spend in each year is that which the city council levies for it, and the city council cannot under the Act be called upon to levy anything beyond the expenses of the schools for the current year: it cannot be called upon to levy any thing for debts which the school board has chosen to contract in previous years, and it was therefore legally within its rights in refusing to levy these sums of \$8,212.54.

The board asked the council for "\$25,000 for ordinary yearly repairs and alterations to school property under the Act, based upon the expenditure of the past ten years." In answer to a request from the city council for further information, they submitted a list in detail, covering 38 printed pages, of the repairs contemplated during the year in the different schools in the city, but without any estimate whatever of the

probable amount of their cost. The council struck off \$5,000 from the amount asked, and consented to levy the remaining \$20,000.

In my opinion, they were not bound in strictness to levy any part of this item, because the estimate furnished them was not such a one as complied with the law. It should have been accompanied by some estimate of the cost of the repairs intended to be made. It is true, the items of the repairs are given, but nothing was laid before the council which would enable them to form the most distant idea as to whether the sum required was a proper one. It is as if they had asked for a sum for a school building, and had given the specifications prepared by the architect, but no estimate of the cost. I think the council can not be compelled to increase the sum they have levied.

The next large item is that of \$6,000 for dais and railing in board room and counters, partitions, screens, etc., in offices. No estimates or particulars accompanied the request, shewing how this sum was made up, and the whole was struck out of the estimates. It appears that the city council had in the previous year submitted to the vote of the electors a by-law for raising this and other sums by debentures, and that the by-law had been rejected. It was contended that in doing this they must have approved the expenditure of this sum for the purpose in question. I do not think I can so hold. They are now asked to find, out of the income of a single year, an expenditure which they were willing to make if it were spread over a number of years and approved by the electors. There is no direct authority in the School Act for the expenditure of money in furnishing board rooms, and I cannot hold that the council were bound under the circumstances to levy this amount.

Under the head of "miscellaneous, based on the yearly expenditure of past years," the school board asked for \$1,000. The city council, although they asked in their letter of the 15th May, 1901, for details of a large number of other items, asked for none with regard to this, but afterwards struck it out *in toto*.

It is reasonable to suppose that, in the multitude of the transactions of so large a business as that carried on by a school

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board, many small and unforeseen expenses must be incurred, such as legal expenses and others, and the sum named was apparently accepted as reasonable in the first place by the council, and I think they should not have struck it off without asking for particulars, when they asked for them in other cases.

The council have struck of \$4,250 from the estimates of \$11,750 for new furniture in new school-rooms, and renewing the furniture in certain existing school-rooms where it is worn out, and for repairs to old furniture. The estimates given at the request of the city council appear to be *prima facie* sufficient, and should have been accepted. I am unable to assent to the argument put forward by counsel for the city that the cost of the furniture of a school-room is to be taken as part of the cost of "the erection of a schoolhouse" under sec. 75 of the Act.

I think the item of \$220 for rent of school-rooms to be used by the children taken care of by the charitable organization known as "The Girls' Home" should not have been struck out. Section 67, taken in connection with sub-secs. 3 and 4 of sec. 65, seems to authorize this expenditure.

I have covered all the items which seem to require special notice. Small sums have been struck off a number of other items, and the action of the council in regard to them is sought to be sustained upon the ground that better particulars might have been furnished. Reasonable particulars, however, seem to have been forthcoming in all cases in which they were asked, and it is to be borne in mind that when proper estimates are furnished by the school board, and the proposed expenditure is within their powers, the city council has no right to dictate to them as to the manner in, or extent to which, they should exercise any discretion vested in them by the School Act. It is undoubtedly an anomaly that the body which is required to levy the taxes should have so little control over the fixing of the amount to be levied and so little check upon the manner in which it is applied, but the Legislature has thought proper for many years to give this very large measure of discretion in regard to expenditure to those in charge of the school system, and it is of course the duty of the city council to carry out the law.

With the exception, therefore, of a sum of \$50 for medals, which does not seem to be covered by any authority given by the Act to the school board, I think the council should have levied in full all the other amounts which they have only levied in part, and that a mandamus order should go requiring them to provide for the school board the sums of money asked for, excepting those which I have held to have been properly refused.

For the reasons given by my brother Meredith in *London Board of Education v. City of London* (1901), 1 O.L.R. 284, I make no order as to costs.

Both parties appealed from this decision.

The appeal and cross-appeal were heard by a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and LOUNT, JJ., on the 12th and 13th November, 1901.

F. E. Hodgins, for the school board. The statute 1 Edw. VII. ch. 39, sec. 71 (O.), provides for the levy of the sum required. Section 65, sub-sec. 9, requires the trustees to submit an estimate. The council is bound to provide whatever is asked by the board. The judgment appealed against recognizes that principle; its error is in the application of it. As to the teachers' salaries, the learned Judge in Chambers was of opinion that if there was no valid contract between the teacher and the board, the board would not be bound to pay, and therefore could not demand a levy. The position is better expressed in *London Board of Education v. City of London*, 1 O.L.R. 284, as it is there made to depend on the legality of the purpose for which the money is asked. The statute clearly authorizes the board to exact money for salaries: sec. 65, sub-sec. 5. The board made a bargain with the teachers, binding on the board, that the teachers should serve for a year at a stated salary, or at such other salary as might be fixed, *i.e.*, by the in-coming board. But, even if we only shew valid action by the board fixing the salaries, which form a proper basis of an estimate, and then send in the estimate, we have done what the statute requires. *Grier v. St. Vincent* (1867), 13 Gr. 512, and a number of other cases, shew that the estimate is the foundation of the

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right, and that the only deduction to be made by the council is in respect of illegal items. See *School Trustees of Port Hope v. Town of Port Hope* (1855), 4 C.P. 418; *In re School Trustees and Corporation of Sandwich* (1864), 23 U.C.R. 639. The agreement is binding though it leaves the in-coming board to fix the amount: *Upperton v. Ridley*, [1901] 1 K.B. 384, 84 L.T.N.S. 18; *Dillon on Municipal Corporations*, 4th ed., sec. 232; *McPherson v. Usborne School Trustees* (1901), 1 O.L.R. 261; *Clerke and Humphry on Sale of Land*, ed. of 1885, pp. 38, 39; *Fry on Specific Performance*, 2nd ed., pp. 151, 152; *Blundell v. Brettargh* (1810-11), 17 Ves. 232; *Wilkes v. Davis* (1817), 3 Mer. 507; *Radnor v. Shafto* (1805), 11 Ves. 448; *Northampton Gas-light Co. v. Parnell* (1855), 15 C.P. 630, 651; *Harding v. Metropolitan R.W. Co.* (1872), L.R. 7 Ch. 154; *Taylor v. Brewer* (1813), 1 M. & S. 200; *Bryant v. Flight* (1839), 5 M. & W. 114; *Village of London West v. Bartram* (1895), 26 O.R. 161. By sec. 56 of the Act, where an estimate is required the city council has no right to require the board to shew a valid contract on foot. The Judge in Chambers has made a mistake in figures; he has struck off \$33,000, which is too much. On the general question of the right of the council to control the school board, I refer to *People v. Wayne* (1865), 13 Mich. 233; *Port Huron Board of Education v. Runnels* (1885), 57 Mich. 46; *Detroit Board of Education v. City of Detroit* (1890), 80 Mich. 548; *State v. Smith* (1860), 11 Wis. 65; *Buckton v. People* (1898), 12 Col. 86, 89. The council have no right to revise the estimates submitted by the board: *Re Board of Education of Napanee and Town of Napanee* (1881), 29 Gr. 395, 396; *In re Perth Board of Education and Town of Perth* (1876), 39 U.C.R. 34, at pp. 45-8; *Hall v. Somersworth* (1859), 39 N. H. 511; *Regina v. Lords Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387; *Tremblay v. Valentin* (1885), 12 S.C.R. 546. As to the right of the council, upon a motion for a mandamus, to go into the question of the propriety of the items, see *In re Toronto School Trustees and City of Toronto* (1863), 23 U.C.R. 203; *Regina v. Mayor, etc., of Wigan* (1870), L.R. 5 Q.B. 267; *People v. Fitch* (1895), 147 N.Y. 355. The appellants are entitled to costs. See R.S.O. 1897 ch. 223, sec. 86, and 1 Edw. VII. ch. 39, secs. 58, 60, (O.)

J. S. Fullerton, K.C., for the city corporation. The cases on the question of estimates are collected in *London Board of Education v. City of London*, 1 O.L.R. 284, at p. 288. I cite also *In re Perth Board of Education and Town of Perth*, 39 U.C.R. 34. There must be a proper method of obtaining these moneys, and the way provided is the furnishing of estimates; they serve the purpose of publicity; it is the only means by which information is given to the public. The estimates serve a double purpose—to give information and to enable the amount to be levied. We say in this case that no estimates were furnished; we are entitled to estimates; whether we have power to cut them down is not in this case. As to the limitations of the powers of school board, I refer to *Cornwall v. Township of West Nissouri* (1875), 25 C.P. 9; *Regina v. Mayor, etc., of Sheffield* (1871), L.R. 6 Q.B. 652, 663-5, overruling *Regina v. Mayor, etc., of Wigan*, L.R. 5 Q.B. 267; *Regina v. Cockerton*, [1901] 1 K.B. 726, at p. 729. On the question of salaries, we contend there was no contract for an increase. To make a contract binding on a school board, it must contract under seal: *Canadian Pacific R.W. Co. v. Township of Chatham* (1895-6), 25 S.C.R. 608; *Waterous Engine Works Co. v. Town of Palmerston* (1892), 21 S.C.R. 556.

Hodgins, in reply, referred for the test of what an estimate should be to *In re School Trustees of South Fredericksburgh* (1876), 37 U.C.R. 534; as to salaries, to *Phillips v. London School Board*, [1898] 2 Q.B. 447.

[Counsel on both sides discussed at length the various items in question on the appeal and cross-appeal].

December 2. MEREDITH, C.J.:—Both parties have appealed against the order of my learned brother Street made on the 19th day of October, 1901, on the application of the public school board, for a peremptory mandamus to the corporation to levy and collect a sufficient sum to pay in full the estimate of the board of the expenses of the schools under its charge for the year 1901, amounting in the whole to \$530,363.66, the corporation having refused, improperly as the board alleges, to levy and collect more than \$461,151, for the levy and collection of which under the provisions of sub-sec. 1 of sec. 71 of the

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D. C. Public Schools Act (1 Edw. VII. ch. 39), the municipal council of the corporation passed its by-law on the 10th June, 1901.

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In the estimate of the school board the expenses are classified under forty-two separate heads, to twenty-seven of which objection was taken on various grounds, two of them being objected to *in toto*, and twenty-five in part, the whole sum objected to being \$69,213; and my learned brother Street held the objections to be well founded, except as to \$18,768.59, and granted the mandamus as to that sum, but refused to grant it as to the residue of the \$69,213, and, as I have said, both parties appeal, each complaining of the order in so far as it is unfavourable to him.

It will be convenient at this point to set out the items objected to and the result of my learned brother Street's judgment as to each of them:—

1. Salaries.	Objected to as to	\$42,841	Objection disallowed as to	\$8,959.25
2. Water rates.	“ “	1,000	“ “ “	406.23
3. Rent.	“ “	220	“ “ “	220.00
6. Gas.	“ “	500	“ “ “	220.11
8. Miscellaneous.	“ in full	1,000	“ “ <i>in toto</i>	1,000.00
12. Repairs.	“ as to	5,000	Objection allowed.	
13. Dais, etc.	“ <i>in toto</i>	6,000	“ “	
14. Printing and advertising.	“ as to	400	Objection disallowed <i>in toto</i>	400.00
16. Fuel.	“ “	2,500	Objection allowed.	
17. New furniture (new rooms).	“ “	2,000	Objection disallowed <i>in toto</i>	2,000.00
18. New furniture (present rooms).	“ “	2,000	“ “ “	2,000.00
19. Remodelling and repairing old furniture.	“ “	250	“ “ “	250.00
20. Caretakers' supplies.	“ “	300	“ “ “	300.00
21. Window shades.	“ “	300	“ “ “	300.00
23. Cupboards.	“ “	100	“ “ “	100.00
25. School supplies.	“ “	410	“ “ “	410.00
27. Blank books.	“ “	452	“ “ “	452.00
28. Business forms.	“ “	263	“ “ “	263.00
29. Book-keeping blanks.	“ “	65	“ “ “	65.00
30. Drawing material.	“ “	142	“ “ “	142.00
31. Writing books.	“ “	201	“ “ “	201.00

33. Book covers.	Objected to as to	130	Objection disallowed <i>in toto</i>	130.00	D. C. 1901 <hr/> RE TORONTO SCHOOL BOARD AND CITY OF TORONTO. <hr/> Meredith, C.J.
35. Kindergarten supplies.	“ “	350	“ “ “	350.00	
37. Medals and certificates.	“ “	50	Objection allowed.		
39. Night schools.	“ “	300	Objection disallowed <i>in toto</i>	300.00	
40. Wall maps.	“ “	300	“ “ “	300.00	
42. To provide for overdrafts from 1900.	“ “	2,139	Objection allowed.		
				<hr/> \$69,213	<hr/> \$18,768.59

My brother Street, in coming to the conclusion that the school board was not entitled to require the municipal council to raise the full amount of the estimate for salaries, proceeded upon the ground that, as to all of the \$42,841 objected to except \$8,959.25, the school board was not entitled to require it to be raised by the municipal council, because, as he determined, it was intended to provide for paying to the teachers in the employment of the school board, as for salaries, sums which the board was under no legal liability to pay, and therefore to make provision for an increase in their salaries “in the shape of a mere prospective voluntary payment which they (*i.e.*, the school board) might make or withhold at their pleasure.” It was, according to the view expressed by my learned brother, “as if they had asked for this \$41,000 in order that they might present it to the teachers as a bonus over and above the salaries for which they had agreed to do the work of their position.”

I am, with great respect, unable to agree with this view. It is, in my opinion, by no means clear that, upon the facts and circumstances appearing in the documentary and other evidence before us, the school board, after the passing of the resolution of the 6th March, 1901, to which I shall refer, was not under a legal obligation to pay the larger salaries for the payment of which the estimate for salaries was intended to make provision.

The material provisions of the agreement between the teachers and the school board, by which they were re-engaged for the year 1901, as far as they affect the question under consideration, are stated by my learned brother, and it is unnecessary for me to repeat them. It will suffice to point out that the agreement of the teacher is not simply to serve during

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the year in the school and at the salary set opposite to his name in the schedule, but that he will serve in that school and at that salary "*or at such salary and in such school and division of the same as they (i.e., the school board) may from time to time appoint,*" and that the contract of the school board, as I read it, is to pay either the salary named in the schedule or that, whether it be higher or lower, which the board should from time to time fix as the salary which the teacher was to be entitled to receive.

The object of framing the contract in this way was, as appears from the evidence of Mr. Wilkinson, the secretary-treasurer of the school board, to secure the re-engagement of the teachers so that their services might be available when the schools were opened at the beginning of January, after the Christmas holidays, and at the same time to leave to the incoming board the fixing of the salaries for the ensuing year, instead of having them fixed by a board the term of office of one-half of the members of which was on the eve of expiring.

The duty of making provision for re-engaging the teachers devolved on the board's management committee, and by its report made on the 29th day of November, 1900, and adopted by the school board, it recommended "that all teachers now on the regular staff be re-engaged except those who are marked 3 or worse in their teaching or discipline by both inspector and principal."

"That all teachers who are marked 3 or fair or worse in both teaching and discipline by the inspector and principal be notified that if there is not some improvement within three months from the date of the notice they will be notified that their services will be dispensed with at the end of June, 1901."

It was in pursuance of this resolution that the agreement to which I have referred was entered into, and agreements in the like form had been entered into between the school board and the teachers in the years 1897, 1898, 1899, and 1900.

According also to the evidence of Mr. Wilkinson, the management committee had no power to fix the salaries to be paid to the teachers who were engaged on their recommendation, and did not assume to do so, the practice of the board

being as I have mentioned to leave that to be done by the new board.

For many years it had been the policy and practice of the board to make yearly increases in the salaries of the teachers who were re-engaged; the amount of these increases was not the same in every year; and there was no doubt no legal obligation resting on the school board to make them in all cases or indeed in any case.

The making of these increases was also not dealt with by the out-going board, but by the board of the year for which the teacher was re-engaged.

On the 1st February, 1900, the board adopted, with some amendments, the report of its finance committee of the 29th of the previous January, recommending a scale of salaries for its teachers, including principals of schools, and for its officers and servants. According to this scale, provision was made as to certain classes of teachers for a minimum and maximum salary, and for an annual increase of salary from the minimum until the maximum was reached; in some classes the annual increase was to be \$50, in others \$24, \$20, and \$12 respectively.

Although, as I have said, an agreement similar in form to that for 1901 was made with the teachers for 1900, the salaries paid in 1900 were not, save perhaps in a few exceptional cases, those set opposite the names of the teachers in the schedule to the agreement, but the salaries as fixed by the board of 1900, which included the increases according to the scale adopted by the resolution of the 1st February, 1900, and for the payment of these salaries provision was made in the estimate submitted by the board to the municipal council for 1900, without any question being raised as to the propriety of the course which was adopted.

The increases which the teachers who were re-engaged had, therefore, when they signed the agreement for 1901, some reason to expect would be made in 1901 to the salaries they had received in 1900, they will not receive if my learned brother Street's order stands.

In 1901 the question of salaries was again considered by the board, and a new scale was adopted by resolution passed on the 6th March, 1901.

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Acting upon the view that, as had been the practice as I have said, it was for the board of 1901 to fix the salaries of the teachers for that year, the salary of each teacher was fixed by the finance committee in preparing the estimates of the year 1901, and upon the adoption of these estimates by the board with the appendix containing the names of the teachers and the salaries to which they were to be respectively entitled for the year, it was assumed on all hands that the salaries so fixed were those which the teachers were to be entitled to receive and the board was to be bound to pay.

It is the difference between the salaries named in the schedule to the agreement and the salaries thus fixed by the board that my learned brother Street has treated as a bonus to the teachers beyond the sums which the board was legally entitled to pay them for their services.

It is, I think, unnecessary to decide whether the view of my learned brother as to the strict legal right of the teachers on this state of facts is correct, [though the inclination of my opinion is the other way], for, in my opinion, it is only when it is made to appear that an expenditure for which provision is made in the estimate of the school board submitted to the municipal council would be clearly an illegal one, that the municipal council is justified in refusing to raise the sum required by the board to be provided to meet that expenditure, unless the purpose for which it is intended to be made is one *ultra vires* the school board, in the sense that it is a purpose for which in no circumstances would it be lawful for the school board of its own authority to apply the money of the rate-payers, in which latter case the municipal council, I do not doubt, would not only be justified in refusing but bound to refuse, to raise the money.

The impracticability of working out the provisions of the Act which are under consideration and which afford the only means by which the money required for enabling school trustees to perform the statutory duties imposed upon them of providing for the public school education of all the children of school age, not being those of supporters of separate schools, if the view insisted on by the corporation as to the powers of

municipal councils is to be adopted, is manifest, I think, when the effect of it is considered.

What is claimed by the corporation is, that the municipal council has the right to call for the production of all contracts and agreements between the school board and its teachers and employees and to require it to be shewn that the sums included in the estimates to provide for the payment of these salaries are payable under the terms of contracts entered into with all the formalities required by law to make them binding on the school board, notwithstanding that, though not so entered into, they are being treated and acted on by teachers and employees and by the school board as valid contracts, and the services provided for are being faithfully rendered under them. It was not, in my opinion, intended that any such inquiry should be entered upon by the municipal council. Such inquiries might and probably would involve the consideration of difficult questions of law and fact in order to reach a conclusion, and if, as it is not unreasonable to assume might happen, it were wrongly concluded that with regard to all the teachers and employees, or as to particular ones, the contracts were not binding, and the municipal council had, therefore, refused to provide for payment of the salaries, the result would necessarily be either that the school board would be under a legal obligation without the means of discharging it, or be forced to apply for a mandamus to compel the municipal council to provide what it had estimated to be necessary, with the possibility that a final decision might not be reached as to its rights until after the year for which the estimate was made had expired.

It would seem to me, therefore, a much more reasonable construction to give to the Act to hold, as I think we should hold, that all the municipal council has a right to ask is, that that which the Legislature has termed an "estimate" shall shew that the school board has estimated the amounts required to meet the expenses of the schools for the current year, and the purposes for which the sums are required, in such a way as to indicate that they are purposes for which the school board has the right to expend the money of the ratepayers, and, when that has been done, the duty is imposed upon the municipal council of raising by taxation (except in the special cases for

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which provision is made by sec. 74) the sums required according to the estimate to meet the expenses of the schools for the current year.

The school board, like the corporation, is a corporate body, and the members of which it is composed are, like the members of the council, elected by the ratepayers, though the electing body is different, and are answerable to their constituents for the manner in which they execute the important trusts which have been reposed in them. Upon the school board is imposed the duty of making provision for the public school education of the children, and to it is given the right to determine, subject to no statutory limitation such as is by the Municipal Act imposed upon municipal councils as to the amount which may be raised by taxation within the year, the amount proper to be expended for school purposes, as long as such purposes are lawful purposes and within the scope of their powers.

The discretion exercised by the school board as to these matters, the municipal council has no authority to question; still less has it any right to substitute for the judgment of the school board, acting within the scope of its powers, its own judgment, even though it may be apparent that the school board has not exercised its discretion wisely; for the action it has taken and for any unwise discretion it may have exercised, the members of the school board are answerable, not to the municipal council, but to their constituents.

I venture to think that the object of the Legislature in providing as it has done for the raising of the money required for public school purposes was simply to avoid the expense and inconvenience to the ratepayers of a double system for the imposition and collection of the rates, one by the municipal councils of municipal rates, and the other by the school boards of public school rates, and in confirmation of this view I may point out that by the Public Schools Act, 1885 (48 Vict. ch. 49, sec. 40, sub-sec. 3) the same system was applied to rural school sections, the trustees of which before then had the option of levying and collecting their own rate or of requiring the municipal council to collect it.

What I have indicated as my opinion has of course no application where bad faith on the part of the school board is shewn,

such as an attempt under cover of a general estimate to provide for an illegal expenditure, and I have no doubt that in a case of that kind the Court would not permit the extraordinary remedy of a mandamus to be used to compel the levying of a rate to provide money which it was proved was intended to be used for such a purpose.

There is still another ground upon which I think the position taken by the corporation is untenable.

Assuming that an action brought by a school teacher against the school board to recover salary on the basis of the scale fixed by the resolution of the 6th March, 1901, to which the provisions of sub-sec. 1 of sec. 81 were pleaded as a defence, must fail because the agreement sought to be enforced was not in writing, signed by the parties to it, and under the seal of the corporation, it by no means follows that, at all events in the circumstances of such a case as this, the school board would not be justified in not setting up such a defence and in paying the teacher the salary which it had deliberately resolved to pay him and had by resolution fixed as the remuneration he was to receive and on the faith of receiving which he had, it might be, continued to serve.

In my opinion, the board would be justified in refusing to set up the technical defence which the statute, on the assumption which I have mentioned, has armed it with, and in paying the salary claimed, and in my view no Court ought to or would at the instance of a ratepayer, if the board had determined to take that course, restrain it from taking it, and it follows, if this be the correct view, that the municipal council would not be justified in refusing to provide the money to enable the school board to pay the salary fixed by its resolution.

If, as was the opinion of my learned brother, it was still open to the school board to put itself under a legal obligation to pay the salaries according to the scale of remuneration which it had adopted by the resolution of the 6th March, 1901, I do not understand upon what principle, having, as its estimates shewed, determined to pay according to that scale, the board should have been denied the right to require the municipal council to levy a rate sufficient to enable it to carry out its intention, even if the entering into of a formal contract

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with the teacher were necessary to justify the payment being made, for it is not to be assumed that the school board would not, before expending the money of the ratepayers, enter into the formal contract which upon that hypothesis must be entered into.

By my learned brother's order, the corporation has been required to provide the salaries, amounting to \$9,100, of sixteen teachers, whose salaries were fixed in precisely the same way as the increases which are in question were provided for, the only agreement with these teachers being that they were to receive such salaries as the board might from time to time appoint. I am, with respect, unable to see why, if it was proper to give effect to the resolution and estimate as to the one, effect should not have been given to them as to the other.

Upon the whole, for the reasons I have given, I am of opinion that it was the duty of the municipal council to levy and collect the full sum which is shewn by the estimate of the school board to be required for the payment of salaries for the year 1901, and that my learned brother's order should be varied by substituting for the sum of \$8,929.25 the sum of \$42,841.

The next item to be considered is number 12, "Ordinary yearly repairs and alterations to school property under the Act, based on expenditure of the past ten years, \$25,000." Of this sum \$20,000 only was provided for by the municipal council, and my brother Street has held that no proper estimate was made of the expenses under this head, and that the municipal council for that reason would have been justified in refusing to levy and collect any part of it, and therefore cannot be compelled to raise the \$5,000 in dispute.

It follows from what, in dealing with the item of salaries, I have stated to be my opinion, that this estimate (subject to an observation which I shall afterwards make as to it) was a sufficient estimate to cast upon the municipal council the duty of levying and collecting the whole \$25,000, and I should be of the same opinion even if, as was contended, the estimate ought to shew the basis upon which it was made.

The school board has under its charge upwards of forty-five school houses, of various ages and descriptions, and it has been its practice in the past to defer until the summer holidays the

making of necessary repairs to them. The necessity for some of the repairs which it might then be found to be required might not be known or indeed have arisen at the time when the estimate of the year is required to be submitted. The finance committee of the board had considered the question of what sum would probably be needed during the year, more than nine months of which had yet to run, and the board had considered and adopted the estimate which the committee had made. The committee and the board had the experience of many past years to guide them in making their estimate as to the probable requirements of the year, and the estimate which they submitted was based, as it shewed on its face, on the experience of the latter ten of those years, and, beyond all this, they procured and furnished to the municipal council, when called on by its board of control to give further information, a detailed statement of repairs which it had been determined should be made, shewing the nature of the repairs to be made on each building which was to be repaired, and covering thirty-eight printed pages, and yet, because the probable cost of these repairs was not given separately, it was contended by the learned counsel for the corporation that an estimate such as the Act requires had not been submitted.

Had the word "alterations" not been used in the estimate under consideration, I should have been prepared to hold that as submitted it was sufficient, but it may be that the use of that word made it uncertain whether provision was not being made for additions to school houses, and therefore for a class of expenditure as to which the council had, under sub-sec. 1 of sec. 76, the right to refuse to raise the sum required. It is unnecessary, however, to consider this point further, because, by the detailed statement to which I have referred, shewing as it did that repairs only were intended, all difficulty on that score was removed.

It is difficult to see what more satisfactory basis could have been adopted for this estimate, when one considers the circumstances under and the purposes for which the estimate was made, and especially the fact to which I have referred that it was extremely difficult, if not practically impossible, to determine in advance, with any degree of exactness, what the

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requirements of the year would be. The basis on which the estimate was made was, besides, one the materials for verifying which were in the possession of the municipal council, all the accounts, books, and vouchers of the school board having been in the previous years (since 1885) audited and reported on by the municipality's own auditor: sec. 65, sub-sec. 11.

I am of opinion, therefore, that it was the duty of the municipal council to levy and collect the whole \$25,000, and that my learned brother's order should be varied by adding the \$5,000 in dispute to the sums directed by it to be levied and collected.

The next item to be dealt with is number 13, "Dais and railing in board rooms, and counters, partitions, screens, etc., in offices, see appendix E, \$6,000."

Appendix E gives the further particulars as to this item, that "It is to carry out plans approved by the city council of last year, for which they included the item in a money by-law."

The school board has rented from the corporation a part of the new municipal building for use as a board room and for offices, for which it pays a rental of \$1,800 per annum, and it is to provide for the furnishing and fitting up of it for these uses that it is proposed to expend the sum of \$6,000.

Having regard to the fact, which is not in dispute, that plans and an estimate of the cost of what is proposed to be done were approved by the municipal council of 1900, and that a by-law was in that year provisionally passed and submitted to the vote of the electors for borrowing \$6,000 to defray that cost, it is not, I think, open to the corporation to complain that the estimate as to this item of proposed expenditure is not a sufficient estimate within the meaning of the Act, if indeed it would otherwise have been open to that objection.

Nor is the estimate open to objection as being for purposes coming within the provisions of sub-sec. 1 of sec. 76, for it clearly does not provide for expenditures of the class with which that sub-section deals. The ground upon which my learned brother refused to direct this sum to be raised appears to have been that there is no direct authority in the School Act for the expenditure of money in furnishing board rooms.

It is true that in terms no such authority is conferred by sec. 65 of the Act, but that I venture to think, with all respect, is not sufficient to justify the conclusion that a school board has not authority to make such an expenditure.

The enumeration of powers of trustees which sec. 65 contains is plainly not intended to be exhaustive. The section, as its heading shews, deals, primarily at all events, with "duties of trustees." No direct authority is given by the section to pay its secretary and treasurer, its officers and servants, though the duty is imposed and the power conferred to appoint them. So, with regard to the important duties dealt with in sub-secs. 3, 4, and 5, no direct authority is given to expend the money required for performing those duties, and none was, in these cases necessary, because, taken in connection with the provisions of sub-sec. 9, the requisite authority is to be implied, for only by implying it can the duties imposed be performed.

In like manner, where, as in sub-sec. 2, it is made the duty of the trustees to fix the place of meetings of the board, there is to be implied, I think, the power to make provision for securing a place of meeting and to make such expenditures as may be necessary for that purpose.

There would, in the case of a public school board such as that of the city of Toronto, be no difficulty in implying a power to rent premises for this purpose, while in the case of a rural school section it is possible that no such implied power might be held to exist.

Section 56 may also be referred to in support of the right of the school board to incur this expenditure. By that section every board in urban municipalities is made a corporation, and is invested with all the powers usually possessed by corporations so far as the same are necessary for carrying out the purposes of the Act: see also the Interpretation Act, R.S.O. 1897 ch. 1, sec. 8 (25).

The school board must also, I think, for a like reason and on the same principle, be held to have authority to provide a place or places where the duties of the secretary-treasurer, the inspectors, and the other officers in its employment, are to be performed.

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If I am right in this view, it necessarily follows, I think, that the school board may provide furniture and furnishings for the rooms it occupies for its own meetings and other purposes, and for the offices in which the duties of its officials are performed.

It may be that the scale of magnificence upon which this is proposed to be done in the present case is greater than the ratepayers may approve of, or it may be that it is only in keeping with that of the new building in which the board and its officials have found accommodation, and with the surroundings, but that question is not for the municipal council or for the Court to deal with.

Assuming good faith on the part of the school board (and its good faith is not questioned), neither to the municipal council nor to the Court is it called upon to give reasons for the manner in which it has chosen to exercise the discretionary power which the Legislature has vested in it, and still less to justify or defend the action which it has taken.

There is, in my opinion, therefore, no ground upon which the action of the municipal council in refusing to raise this sum of \$6,000 can be sustained, and the order appealed from should therefore be varied by adding this sum also to the amount which is by the order directed to be levied and collected.

The small item of \$50 deducted from item 37, medals and certificates, should not, I think, have been disallowed, for similar reasons to those which I have given for holding that the expenditure of the \$6,000 with which I have just dealt, may be justified.

It appears to have been taken for granted that the \$50 deduction was in respect of medals, though what ground there is for that assumption I have not been able to discover. It would seem that the medals and certificates are in the nature of prizes for the pupils, or in lieu of prizes. Authority is given by the Act to provide prize books, and it was under the idea, perhaps a mistaken one, that this authority was a justification for giving medals and certificates, that the practice of giving that kind of reward of merit has been adopted. However that may be, I do not see why such recognitions of the standing and merits of pupils may not, under the general powers of school

boards, be provided at the expense of the ratepayers. If, as appears to have been conceded, it was lawful to provide certificates printed or graven on paper, I do not see why so moderate an expenditure as is proposed for testifying on the more enduring substance of a medal to the standing or merit of a pupil may not be justified.

There remain, in order to dispose of the appeal of the school board, to be considered the items intended to provide for liabilities incurred in 1900, the payment of which was deliberately held over until the present year. My learned brother Street decided that these payments do not form part of the expenses of the schools under the charge of the board for the current year, and should not therefore have been included in the estimate; and with that view I agree. The Act makes no express provision for cases which must sometimes occur, where it has become necessary, owing to too small an estimate having been made to cover the necessary expenses of the year, to incur liabilities beyond the amount provided for in the estimate of the year, and I desire to leave open, as far as I am concerned, until it comes up for decision, the question whether in such circumstances the Act may not be so construed as to justify the amount of the over-expenditure being treated as an expense of the following year, at all events where the payment has been made in that year, but, as far as the present case is concerned, I do not see how the Act can be interpreted so as to bring the expenditure in question within its terms.

I also agree with the conclusion of my learned brother Street as to the items in question on the cross-appeal, and would only add for myself to the reasons he has given for coming to that conclusion, that, in my opinion, the estimate as to those items was a sufficient estimate.

I have not found it necessary to discuss the cases cited by Mr. Fullerton in support of his argument, as to what are the requisites of an estimate such as the school board is required to submit according to the provisions of sub-sec. 9, sec. 65.

I have been unable to deduce from the cases any principle of general application to be acted upon in determining the requisites of such an estimate. If the observations of a general character made by the Judges in dealing with the particular

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facts upon which they were called upon to decide in the cases cited are to be taken to enunciate a principle to be applied generally to the construction of the sub-section, we are of course bound, as far as we understand that principle, to apply it in this case. I am, however, of opinion that no such principle is enunciated, and that the observations referred to are applicable only to the facts of the cases then under consideration, and have no application to estimates for such expenditures as are dealt with in the items in dispute in this case. It is not unimportant to observe that the language used would seem to indicate that in the view taken by those learned Judges there is vested in municipal councils some discretion as to the amount of the expenditure to be made by the school board, and as to the propriety or expediency of a proposed expenditure, but it is now clear that the council has no such discretion, and that, as was said by Mr. Justice Sedgewick, in delivering the judgment of the Supreme Court in *Canadian Pacific R.W. Co. v. City of Winnipeg* (1900), 30 S.C.R. 558 at p. 563, referring to the effect of Manitoba legislation corresponding with our own: "The school trustees had the right of determining without question the amount which was to be raised for public school purposes within the city limits and of authoritatively calling upon the city authorities to collect and hand over that amount, while the latter authorities were under an absolute obligation to obey the behests, in that regard, of the school trustees."

See also *Re Board of Education of Napanee and Town of Napanee*, 29 Gr. at p. 396.

And it may well be that expressions of opinion as to the requisites of an estimate based upon the view that there was vested in municipal councils such a discretion as it is now clear is not vested in them, are not to be taken as a guide in determining what these requisites are.

Assuming, however, that the expressions of opinion to which I have referred were the *rationes decidendi* of the cases cited by Mr. Fullerton, and are binding on us, my conclusion as to the proper disposition to be made of these appeals would be the same, for, in my opinion, the estimate in question, supplemented as it was by the additional information furnished by the school board, satisfied all the requirements of an estimate such as,

according to these expressions of opinion, the statute makes provision for.

I have dealt with the case on the assumption that the provisions of the statute of 1901 are those applicable, and not those of the corresponding sections of R.S.O. 1897 ch. 292. The argument of counsel was based on that assumption, and rightly so, I think, because, though the estimate was first submitted before the Act of 1901 came into force, it was after it came into force that the additional particulars were furnished, and the two (the estimate and the additional particulars) together constituted the estimate of the school board, and the estimate was, therefore, submitted after the new Act became operative.

The result is, that, in my opinion, the appeal of the school board should be allowed and the order appealed against varied to the extent I have indicated, and that the cross-appeal should be dismissed, and the corporation should pay the costs of the motion and of the appeal and cross-appeal.

MACMAHON, J.:—During the argument I entertained the opinion that the increase in the salaries of the teachers, after the formal contracts entered into in December, 1900, by them with the school board, was, as expressed by Mr. Justice Street, in the nature of a bonus over and above the salaries for which they had agreed to do the work of their respective positions; but, having regard to the provisions of the contract, it is clear that the salary is not absolutely fixed by the amount placed in the schedule opposite the contracting teacher's name, but is to be at that salary "or at such salary and in such school and division of the same as the school board may from time to time appoint," so that what may be called a provisional contract was entered into by the teacher, and the in-coming school board could increase or reduce the salary mentioned in the schedule according to the school or division in which such teacher was placed.

When one speaks of an "estimate" for work to be performed, that usually includes a somewhat detailed description of the work and the materials to be employed in its construction and the cost thereof. But, as pointed out in the judgment of his

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Lordship the Chief Justice, where estimates are furnished by the school board, that particularity is not required.

I agree with the disposition of the appeal and cross-appeal made in the judgment of the Chief Justice.

LOUNT, J. :—I agree.

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BYER v. GROVE.

Oct. 29.

Devolution of Estates Act—Real Representative—Sale of Land—Lapse of Year—Vesting in Heirs—Injunction—R.S.O. 1897, ch. 137.

Letters of administration to the real estate of an intestate who died on October 18th, 1900, were issued to the defendant on October 14th, 1901. Prior to the latter date the defendant had advertised the lands for sale on October 22nd, 1901, on the day preceeding which date, the plaintiff, one of the heirs, applied for an injunction to restrain the sale. No caution had been filed within the year nor did it appear that there were any debts of the deceased :—*Held*, that the plaintiff was entitled to an injunction, for when the defendant advertised the lands for sale he had no right to do so, and at the proposed time of sale he had no right to sell since by the operation of the Devolution of Estates Act the property had vested in the heirs.

MARY GROVE died on October 18th, 1900, seized in fee simple of certain lands in the township of Markham, leaving her surviving her husband, the defendant, and her brothers and sisters, her heirs-at-law. Letters of administration to her personal estate were issued by the proper surrogate court in that behalf to the defendant on January 22nd, 1901, and letters of administration to her real estate were issued to the defendant on October 14th, 1901. Prior to the issue of the latter letters of administration on October 14th, 1901, the defendant advertised the said lands for sale. The sale was advertised to take place on October 22nd, more than a year after the decease of the intestate. No caution had been filed pursuant to the provisions of the Devolution of Estates Act, and it appeared that there were no debts of the deceased, and that the defendant, as administrator of the personal estate of the deceased, had theretofore distributed the same.

The plaintiff, one of the heirs of the deceased, on October 21st, 1901, obtained an *ex parte* injunction restraining the sale of the lands by the defendant, and on October 29th, 1901, moved in Weekly Court to continue the injunction. The motion was, by consent of counsel, turned into a motion for judgment. It also appeared that after the granting of the *ex parte* injunction, and after the day fixed for the sale, the defendant had obtained an *ex parte* order from the county court Judge permitting the registration of a caution notwithstanding the lapse of the year, and that such caution had been registered.

W. E. Middleton, and *C. R. Fitch*, for the plaintiff.

S. B. Woods, and *J. F. Lennox*, for the defendant.

STREET, J.:—It is clear that at the time the defendant advertised the lands for sale he had no right so to advertise as he was not then appointed administrator of the real estate of the deceased. It is also clear that at the time he proposed to sell the lands he had no right to sell them, as, by the operation of the Devolution of Estates Act, R.S.O. 1897, ch. 127, the property had become vested in the heirs of the deceased. The subsequent registration of the caution cannot in any way affect the right of the plaintiff to bring this action. The plaintiff is entitled to an injunction restraining the defendant from selling or attempting to sell his interest in the lands in question without his consent or without some title acquired subsequent to the commencement of this action to do so, and to his costs of suit. I do not think I can in this action determine the validity of the caution filed since the action was commenced. Probably if the defendant is well advised he will consent to the caution being at once vacated.

Counsel for the defendant then consented to the caution being vacated, and it was adjudged accordingly.

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IN RE CAMERON.

Nov. 9.
Dec. 26.

Executors and Administrators—Direction to Set Aside Certain Sum and Pay Income to Life-Tenant—Productive and Unproductive Assets—Rights of Life Tenant.

A testator directed his executors to set apart and invest \$50,000 out of his estate, and pay the income semi-annually to his wife during her life, with power to appoint, and in default of appointment, over. He then gave the residue equally among his children. The estate consisted of income producing securities to the value of \$30,000, and a large amount of unproductive land :—

Held, that the executors were bound to reserve sufficient productive assets to secure an income adequate to the payment of taxes and other necessary expenses, and the widow was entitled, from the expiration of a year from the testator's death, to a first charge on the unproductive assets for the income so taken, and to the balance of the income from the productive assets, and to have the principal producing such balance, set apart towards the fund of \$50,000, ultimately to be made up as the lands were sold, according to the following rules :—As lands or other assets were sold the proceeds should be apportioned between capital and income by ascertaining the sum which, put out at interest at the expiration of a year from the testator's death, and accumulated at compound interest with half-yearly rests, would, with accumulations of interest, have produced at the day of receipt, the amount actually received from the sale of the lands or other assets; the sum so ascertained to be treated as capital, and added to the sum theretofore set apart towards the \$50,000; and the residue to be treated as income and paid over to the widow.

In re Earl of Chesterfield's Trusts (1883), 24 Ch. D. 643; and *In re Morley, Morley v. Haig*, [1895] 2 Ch. 738, applied.

THIS was an appeal by Mabel V. Bayly, one of the beneficiaries under the will of M. C. Cameron, deceased, from the report of the Master at Goderich, in respect to his finding as to the claim on the estate of the deceased of his widow, for whose benefit the testator directed that a sum of \$50,000 should be set apart out of his estate and invested, and the income paid to her semi-annually during her life, in lieu of dower.

The circumstances of the case are set out in the judgment.

The appeal was argued on October 30th, 1901, before STREET, J., in Weekly Court.

W. H. Blake, for the appellant, contended that the widow was only entitled to the net income on the amount set aside by the executors to carry out the provisions of the will; that there was not a gift here of a certain semi-annual sum to be derived from a certain source: *Re Denison, Waldie v. Denison* (1893), 24 O.R. 197; that until conversion, in such a case as this, the

person entitled gets only the net income of the unconverted estate: *Baker v. Baker* (1858), 6 H.L. 616; *Carmichael v. Gee* (1880), 5 App. Cas. 588, 597, as referred to in Williams on Executors, 9th ed., vol. 2, at pp. 1212-3; *ib.* at pp. 1246-7.

J. T. Garrow, K.C., for the Toronto General Trusts Corporation, the executors, and Mrs. M. C. Cameron, the widow, contended that the widow's right was prior to that of all other beneficiaries: *Koch v. Heisey* (1894), 26 O.R. 87; *Acey v. Simpson* (1842), 5 Beav. 35; and that the Master was right in allowing 6 per cent., as the rate of legal interest was not changed to 5 per cent. until 1900 by 63-64 Vict. ch. 29 (D.), which statute is expressed not to be retroactive.

Blake, in reply, pointed out that there was no finding that the whole estate was worth as much as \$50,000.

November 9th, 1901. STREET, J.:—Appeal by Mabel V. Bayly from the report of the Master at Goderich, dated October 9th, 1901.

The question raised by the appeal is as to the rights of Mrs. Cameron, the widow of M. C. Cameron, late of Goderich, deceased, under the terms of his will. By his will, after certain specific bequests and devises, the testator directed his executors and trustees to set apart the sum of \$50,000 out of his estate and invest the same as they should see fit, and to pay the income to arise therefrom semi-annually during her life to his wife for her sole and separate use during her natural life, such provision to be in lieu of all dower in his lands; and he gave his said wife power by will to bequeath and appoint the said sum unto and among the children and grandchildren of himself and his said wife in such portions as she might see fit, and declared that in default of any such disposition the fund should be equally divided at her death amongst their children. The residue of his estate he then gave equally amongst his children. The Master, in pursuance of one of the directions contained in the reference to him, has ascertained and reported the items of which the trust estate now consists and the dealings of Mrs. Cameron and her co-executor with the estate.

It appears that the estate is composed of some \$30,000 of securities of various kinds bearing interest and producing about

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\$1,700 a year, and of a large amount of unproductive land in Ontario, Manitoba, and elsewhere, and of some furniture and other unproductive chattel property, the greater part of which belongs during her life to Mrs. Cameron. The executors have never set apart any sum of money under the direction in the will above referred to, but she received during the year following the death of the testator, as interest upon monies of the estate which bore interest, the sum of \$1427.91, and as to this sum, by an agreement between the persons interested in the estate, there is no question raised. She, however, received a further sum of \$2,385.22 beyond this \$1,427.91, and beyond certain sums properly paid out by her for the estate, and against this sum the Master in his report has given her credit at 6 per cent, on the \$50,000 from September 26th, 1899 (when the first year after her husband's death expired) to March 26th, 1901, being the last gale day before the date of the report, 18 months in all, amounting to \$4,500, and bringing her out as a creditor of the estate on the 26th March, 1901, for \$2,114.78. The appellant objects upon this appeal to the allowance of interest on the \$50,000 being allowed her, because no such sum is in existence bearing interest; the appellant contends that no greater sum should be allowed than the income actually produced by the estate since September 26th, 1897.

The widow is not at present entitled to be credited with interest on \$50,000, because that sum has not been set aside for her, and it is possible that it never may be, and, therefore, the Master's report in this respect is wrong. It appears that in all only some \$30,000 of capital has been realized over and above necessary outgoings and is now invested and producing interest; the remainder of the estate consists chiefly of unproductive lands upon which taxes must be paid. The trustees are bound to reserve sufficient productive assets for the preservation of these lands and for payment of the charges upon the estate prior to the widow's claim, and for other necessary expenses. The widow is entitled to the income of the balance, from the 26th September, 1899, being one year from the testator's death, and to have the principal producing this income set apart as directed by the will towards the fund of \$50,000, ultimately to be made up to that sum as the lands are sold, according to the

rule applicable to such cases, which is as follows: As lands or other assets are sold the proceeds are to be apportioned between capital and income by ascertaining the sum which, put out at interest on September 26th, 1899, at 6 per cent. until July 7th, 1900, and at 5 per cent. afterwards, and accumulated at compound interest with half-yearly rests, would, with the accumulations of interest, have produced at the day of receipt, the amount actually received from the sale of lands or other assets; the sum so ascertained shall be treated as capital and, added to the amount theretofore set apart towards the \$50,000; the residue shall be treated as income and paid over to the widow.

In re Earl of Chesterfield's Trusts (1883), 24 Ch. D. 643; *In re Hengler, Frowde v. Hengler*, [1893] 1 Ch. 586.

This rule recognizes the principle that the assets are treated as converted into money and set apart as a fund at the end of a year from the testator's death, although the actual conversion has been postponed in the interests of the estate, and it prevents the injustice to those in remainder after the widow's death which would be done by the Master's method of treating every sum realized from the estate as applicable in the first place to interest. Such a method might result, it is plain, in the whole of the assets of the estate being paid to the widow as interest on an imaginary fund which never existed, or which, having once existed in part, became entirely exhausted by being converted again from time to time into imaginary interest on the portion of the fund which never had any real existence.

The report must be referred back to the Master in order that he may ascertain the state of accounts between the widow and the estate upon the basis which I have stated.

The widow must pay the costs of this appeal.

Afterwards, on December 26th, 1901, the minutes of the judgment having been spoken to.

STREET, J.:—I think the case of *In re Morley, Morley v. Haig*, [1895] 2 Ch. 738, applies here. A portion of the income which would otherwise go to the widow is taken by the executors for the necessary purpose of paying taxes and preserving the unproductive portion of the estate, and

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I think it is evident when the *Earl of Chesterfield's case*, 24 Ch. D. 643, is examined it is in entire harmony with *Re Morley*, and the judgment should be modified by declaring the widow entitled to a first charge upon the unproductive assets for the income derived from the productive assets not actually set apart for her which is devoted to the preservation of the productive assets, before the division into capital and income of the proceeds of the unproductive assets when realized in the manner directed by the judgment. The position will be the same as if the executors were to set apart for the widow all the productive assets from time to time as part of the \$50,000 and were then to borrow from the income realized from the productive assets so set apart, sufficient sums yearly to pay the taxes, etc., promising to repay them out of the first sales with compound interest.

The costs of both parties of speaking to the minutes should come out of the *corpus* of the estate.

A. H. F. L.

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Nov. 1.

Summary Judgment—Bill of Exchange—Conditional Delivery—Notice—Innocent Holders—53 Vict., ch. 33, sec. 21, sub-sec. 3 (D.).

On a motion for summary judgment under Con. Rule 616 by the payee of a promissory note against the maker, who alleged on his examination for discovery that he made and delivered the note to a trading company for a purpose other than that for which the company deposited it with the plaintiffs, but did not state that the plaintiffs had notice thereof :—

Held, that the plaintiffs were entitled to judgment.

THIS was a motion for judgment on a promissory note under the circumstances mentioned by STREET, J., before whom it was argued on October 31st, 1901, in Weekly Court.

J. H. Moss, for the plaintiffs.

W. C. McKay, for the defendant.

Watson v. Russell (1862), 3 B. & S. 34; *Haynes v. Foster* (1833), 2 C. & M. 237; Bills of Exchange Act, 53 Vict., ch. 33 D., sec. 21, sub-sec. 3, were referred to on the argument.

November 1. STREET, J.:—Motion for summary judgment under Rule 616 by the payee of a note made by the defendant.

The defendant in his examination admits the making of the note, and says that he made it and left it with the officers of the Consolidated Pulp and Paper Co. to be used by them in procuring an advance from the plaintiffs, the payees of the note, for the purposes of the company, and that the note was deposited with the plaintiffs by the officers of the company as security for past advances instead. It is not alleged that the defendant was induced by any fraud to make the note, or that the officers of the company acted fraudulently towards him. He alleges in his statement of defence only that the plaintiffs took the note without consideration. He does not allege notice to the plaintiffs of the terms on which he delivered the note to the officers of the company.

In my opinion, no defence is shewn to the note; notice to the plaintiffs is not even alleged, and the onus of making out

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his defence is upon the defendant: *Watson v. Russell*, 3 B. & S. 34; Bills of Exchange Act, sec. 21, sub-sec. 3.*

There will be judgment for the plaintiffs for the amount of the note, with interest and costs, including the costs of this motion.

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* 3. Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

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Nov. 6.

IN RE STARR, STARR V. STARR.

Husband and Wife—Statute of Limitations—Executors and Administrators—Right of Retainer—Devolution of Estates Act.

In 1876 the plaintiff advanced to her husband the purchase money of certain land subject to a mortgage and which was accordingly conveyed to him. The existing mortgage was paid off and a fresh mortgage was subsequently executed, the plaintiff joining to bar her dower in it. On his death in 1893 he devised the land to the plaintiff and one of his sons in equal shares. In 1901 the plaintiff obtained an order for partition or sale of so much of the land as had not been sold, and a sale being made, she filed a claim upon the proceeds as a creditor for the amount originally advanced by her to purchase the lands. The plaintiff alleged that the land was conveyed to her husband to enable him to vote:—

Held, that assuming the purchase money was entrusted to the plaintiff to her husband to invest for her in the purchase of land, that express trust was performed and was at an end when the land was conveyed to him:—

Held, also, that even assuming the money had been advanced by her by way of loan, her claim was barred by the Statute of Limitations, for there is no reason why the Statute of Limitations should not be applied to such a claim by a wife against her husband in the same way as if she were not his wife:—

Held, also, that though she was her husband's executrix, she had no longer any right of retainer in respect to her alleged debt, as by her own acts, by registering no caution within twelve months and then treating the property as vested in the defendants, the heirs of her co-devisee, she had put the assets out of her own possession and control.

Under all the circumstances of the case, and in view of the conduct of the plaintiff, held, however, that the transaction was not a loan but a gift by the plaintiff to her husband.

THIS was an appeal by the defendants Stephen Starr and Thomas Starr from a report of the local Master at Ottawa.

The circumstances giving rise to the appeal were as follows:—

On November 14th, 1876, a conveyance was made by Owen Ryan and wife to Michael Starr of certain lands in the city of Ottawa. The purchase money paid was \$557.46, and the grantee assumed in addition the payment of a mortgage upon the property for \$213.34 and interest, making up in all the purchase money of \$800, which was the agreed price. Mary Starr, the plaintiff, was the wife of Michael Starr at the time of this conveyance, and the \$557.46 which was paid down was her separate estate which she handed to her husband for the purpose of making the purchase. The conveyance was taken in his name with her consent. Michael Starr and his wife, with his three sons by a former wife, the defendants Stephen and Thomas Starr, and Edward Starr, since deceased, lived upon the property thenceforward. The existing mortgage was paid off, and later on a new mortgage for \$325 was made upon the property by Michael Starr, his wife joining to bar her dower, in order to raise money, part of which went to procure a team of horses for his sons, the defendants, when they grew up and went to work in the lumber woods. They brought their earnings home from time to time and handed them to their father who, it is said, handed them over to his wife. No account was kept of these monies, which are said by the sons to have amounted to several hundred dollars. The plaintiff admits having received part of these monies, and says they were applied in household expenses. Michael Starr died on August 6th, 1893, and by his will devised and bequeathed all his estate to the plaintiff and his son Edward in equal shares. The plaintiff was present and knew the contents of the will. She and Edward Starr proved the will and signed the petition for probate and the inventory of the real and personal estate, and swore that the deceased was the owner of the land in question at the time of his death. On February 13th, 1894, the plaintiff and Edward Starr sold and conveyed to Mary E. Fagan the south half of the parcel of land in question for \$540. \$325 and some interest of this was applied in paying off the mortgage on the whole lot which had been made by Michael Starr and the plaintiff. Edward received \$100 of it in cash, and the plaintiff got the remainder.

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It was found that the part sold covered part of the house on the north half, and the plaintiff and Edward obtained a conveyance back from Mary E. Fagan of the northerly four feet of the southerly half of the lot. This was in February, 1898. On February 9th, 1900, Edward died intestate and without issue, leaving his brothers, the defendants Stephen Starr and Thomas Starr, his heirs at law.

On April 1st, 1901, the plaintiff applied to the local Master at Ottawa upon notice to the defendants, Stephen and Thomas Starr, for an order for the partition of the northerly half and the northerly four feet of the southerly half of the land in question. This application was supported by her affidavit that her husband Michael Starr was owner in fee simple at the time of his death of the whole lot, and that when Edward died she and Edward were owners in fee simple of the unsold portions of it in equal shares.

Upon this application an order was made for partition or sale of the land, and for a reference to the local Master to make necessary enquiries, take accounts, tax costs, and for the adjustment of the rights of all parties.

On May 20th, 1901, the lands in question were sold under the partition proceedings for \$1,420. The Master then advertised for creditors of the estate of Michael Starr, whereupon the plaintiff filed a claim that on November 14th, 1876, she advanced to her husband, Michael Starr, \$800, for the purpose of purchasing the land in question, and that she consented to the deed being taken in his name in order that he might have a vote upon it. She claimed \$800 with interest at six per cent. for six years as a charge upon the land. The Master allowed the plaintiff's claim at \$828.80, being \$557.46 principal and \$271.34 for interest from August 6th, 1893, to the date of the report. The taxes and water rates upon the lot were \$76.84, the cost of the proceedings were \$261.82, leaving a balance of \$252.54 out of the purchase money to be divided into two shares, between the plaintiff, who took one half, and the defendants, who took the other half between them. The defendants appealed from this report upon many grounds, which appear in the judgment.

The appeal was argued on October 31st, 1901, before STREET, J., in Weekly Court.

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E. D. Armour, K.C., for the appellants, contended that as the plaintiff had chosen to say that the property purchased should be treated as her husband's property, she could only claim as a simple contract creditor for the money advanced in 1876; but that her claim as such was barred by the Statute of Limitations; that the cases relied on by the Master: *Elliott v. Bussell* (1890), 19 O.R. 413; *Re Flamank, Wood v. Cock* (1889), 40 Ch. D. 461; *Wassell v. Leggatt*, [1896] 1 Ch. 554, were cases of trusts; but that Mary Starr had abandoned that position long ago; and her actions had been quite inconsistent with it.

G. H. Watson, K.C., for the plaintiff, contended that there was a resulting trust in favour of the plaintiff in respect to the property purchased, and that she should not be held to have estopped herself by her acts: *Coyne v. Broddy* (1888), 15 A.R. 159; Anglin on Trustees, pp. 4-5; that she would have been entitled to an equitable charge on the land for the money advanced; that the Statute of Limitations did not apply to bar her claim: *Soar v. Ashwell*, [1893] 2 Q.B. 390; *Cook v. Grant* (1882), 32 C.P. 511; *Rusling v. Rusling* (1887), 42 N.J. Eq. 594; *Boughton v. Flint* (1878), 74 N.Y. 476; *Milner v. Hyland* (1881), 77 Ind. 458; *In re Whittaker, Whittaker v. Whittaker* (1882), 21 Ch. D. 657; and that even if a simple contract creditor, she was claiming against an estate of which she was executrix, and could not be compelled to plead the statute: Williams on Executors, 9th ed., p. 1699.

Armour, in reply contended that if the plaintiff had a charge on the land, she must bring an action against the present owner of the land and establish it; and that if she was claiming as a simple contract creditor, the claim could not be properly dealt with on these partition and sale proceedings.

November 6, 1901. STREET, J. [after setting out the facts as above]:—The defendants set up the Statute of Limitations as an answer to the plaintiff's claim. The Master in answer to this objection says that the money was entrusted to Michael Starr by the plaintiff to invest for her in the purchase of this

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land, and that he became an express trustee of it for the purpose; that the claim is one "to recover trust property or the proceeds thereof still retained by the trustee," and the Statute of Limitations cannot be set up as an answer. He refers to *In re Flamank*, *Wood v. Cock*, 40 Ch. D. 461; *Wassell v. Leggatt*, [1896] 1 Ch. 554, and *Elliott v. Bussell*, 19 O.R. 413, as sustaining this view. I think it is clear that this construction of the effect of the facts found by the learned Master cannot be sustained. Admitting as a fact that the \$557.46 paid for the equity of redemption on November 14th, 1876, was the plaintiff's own money (and this is not now disputed), three hypotheses are open. It may have been a gift to her husband; it may have been a loan to him; or it may have been intended that she should be the purchaser, and that there should be a resulting trust of the beneficial ownership of the land to her. As I understand the Master's judgment, he has adopted a view which brings the case within the third of these alternatives, because he says that the money was entrusted by the wife to the husband to invest for her in the purchase of this land. She says herself that she agreed that the conveyance should be taken in his name in order that he might have a vote upon it. The effect of the Master's finding, coupled with the admission of the wife, is that the express trust upon which the husband received his wife's money was strictly and completely performed when he took the conveyance in his own name of the land which her money had purchased, and that particular trust was at an end. Nothing remained of the express trust, but the question remains whether under the circumstances there was a resulting use or trust in favour of the wife arising from the fact that her money had been used to pay for it. It is to be borne in mind that the plaintiff is claiming here as a creditor of her husband's estate, having filed her claim, in answer to an advertisement for creditors, in her own partition suit, and having sworn that on the November 14th, 1876, she advanced \$800 to her husband for the purpose of purchasing the land in question, and she claimed this \$800 and interest at the rate of six per cent. as a charge upon the land.

Now, if the plaintiff advanced the money to her husband as a loan in order that he might purchase the land, she became a

creditor of his for the advance, but there was no resulting trust of the land, because to raise such a trust the money must have been paid by her in the character of purchaser of the land, and not as a mere lender to the purchaser. On the other hand, if she paid the money out as purchaser of the land, taking the conveyance in her husband's name, her rights were to the land as the beneficial owner of it, and not against her husband as his creditor. It, therefore, becomes necessary to determine whether the plaintiff paid out this money as purchaser of the land on the one hand, or as a gift or loan to him on the other, and the facts all seem to point conclusively to the latter alternative. In the first place, the title was taken in his name because he wished to vote upon it. It was supposed, whether rightly or wrongly, that the ownership of the property was essential to his right to vote, and accordingly the title was vested in him. This object could be rightfully carried out, as the parties believed, only by the husband becoming the owner, and accordingly he was made the owner so far as documents could do it. It should not be assumed that the plaintiff intended to hold her husband out as owner in order that he might gain an advantage which really did not belong to him. There is, therefore, at the inception of the transaction a presumption, perhaps not a very strong one, that the intention of the parties was that he should become the owner of the land in order that he might have a vote upon it, and that the money which went to purchase it had been furnished by her to him as a loan. The mortgage on the place when the purchase was made was afterwards paid off, and it does not appear to have been paid with her money. A new mortgage was made later on by her husband, in which she joined to bar her dower, the main object of the loan, it is said, being to help his sons. She was aware of the terms of his will at the time it was made, and made no objection to his dealing with this land as his own; she proved the will and swore that the property was her husband's in the affidavit to lead the grant of probate. She joined with the other devisee, her stepson Edward, in a sale of half the lot, and shared the purchase money with him, and she took the present proceedings for partition, basing them upon her own affidavit that her husband was owner in fee simple when he died, and that by

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his will she and Edward were owners of the unsold portion of it in equal shares. Finally, when the land had been sold under these proceedings, which could not have been taken had she been sole owner, she filed her claim as a creditor, based upon an advance of the purchase money to her husband in 1876.

I think in the face of all this it would be impossible for me to hold otherwise than that the \$557.46 was either a gift or a loan to her husband, and that he, and not she, became the purchaser of the land; that she knew it, and that there was neither an express trust of the money, nor a resulting trust of the land in her favour. She cannot be allowed to take one position at one time and another at another: *Cave v. Mills* (1862), 7 H. & N. 913; *Groves v. Groves* (1829), 3 Y. & J. 163, 173, 174; *Rogers v. Hadley* (1863), 2 Ex. N.S. 227; *In re Hallett's Estate, Knatchbull v. Hallett* (1879), 13 Ch. D. 696, at p. 727.

The defendants in the partition proceedings, Stephen and Thomas Starr, set up the Statute of Limitations as an answer to the plaintiff's claim as a creditor. The Master, as I have said, held that there was an express trust in her favour, and that for that reason the statute afforded no answer to her claim as a creditor. I have endeavoured to point out that inasmuch as the husband applied the money exactly as his wife says she directed him to do, any express trust beyond the immediate application of the money never existed, and that the transaction, if not a gift, was a mere ordinary loan from the wife to the husband. It was competent for the wife to become her husband's creditor, and to enforce her rights just as if she were a *feme sole*: R.S.O. 1897, ch. 163, sec. 15; and I see no reason why the Statute of Limitations should not be applied to a claim by a wife against her husband to recover a loan from him in the same way as if she were not his wife. It was, however, argued by her counsel before me that even if there were no express trust, the plaintiff, as surviving executrix of the testator, had a right to retain her debt out of the assets of his estate, although her right of action upon it were barred by the statute. The answer made to this is that the land in question had ceased to be assets in the hands of the plaintiff for the payment of debts of the testator, and had become vested, under sec. 13 of

the Devolution of Estates Act, R.S.O. 1897, c. 127, in the plaintiff and the defendants as owners under the terms of the will, and it was too late after the property had been sold under the partition proceedings to set up a right of retainer.

I think this position is strictly correct; the plaintiff has by her own acts, that is to say, first by registering no caution within the twelve months, and then by treating the property as vested in the defendants, put the assets out of her own control and vested the title to them in the defendants, and she now seeks, not to retain assets in her own possession to satisfy her claim, but to recover her debt out of property which she has handed over to third parties, and which is no longer in her possession.

The principles upon which the right of retainer by an executor is based, and its limitations, are exemplified by the decision of Mr. Justice Kay in *Re Jones, Calver v. Laxton* (1885), 31 Ch. D. 440, 444, and it is there shewn that possession, or its equivalent, are necessary to support the right.

I have been considering the question as if the plaintiff had established that the payment she made upon the property in question was a loan to her husband, and I have come to the conclusion that if it is to be treated as a loan the plaintiff's right to recover it is barred by the Statute of Limitations, and the right of retainer is gone. I am of opinion, however, looking at all the circumstances, that the proper conclusion to come to is that the transaction was not a loan, but a gift, basing my opinion upon the conduct of the plaintiff herself. There does not appear to have been any stipulation for repayment, nor for the payment of interest; so far as the evidence goes, no reference was made to the existence of any liability on the part of the husband to the plaintiff during his lifetime; after his death she continued to deal with the estate in a manner which was inconsistent with the existence of a claim on her part against the estate; she divided the proceeds of the sale of part of the assets with Edward without any assertion of a claim to them on her part, and she allowed the real estate to vest in the devisees as such without claiming her debt against it. She was the only person living after the death of her husband who could know absolutely whether she gave the money to her husband

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or lent it to him; for twenty-five years she made no claim that she was a creditor, and since her husband's death has repeatedly shewn by her acts that she did not claim to be one. Under these circumstances, I think the onus of proving a gift has been lifted from the shoulders of the defendants, and that the only logical and proper conclusion from the admitted facts is that the transaction itself was a gift, and the late assertion that it was a loan, an afterthought. It will be unnecessary that the matter should go back to the Master, as the figures are all before me in the third schedule to his report. The money in Court should be divided as follows:—

Plaintiff's share of commission,	-	\$105.00	
Disbursements,	-	-	107.52
			<hr/>
			\$ 212.52
Defendants' share of commission,	-	\$45.00	
Disbursements,	-	-	4.30
			<hr/>
			49.30
James Lindsay, Treasurer of Ottawa—			
Taxes,	-	-	\$54.89
Water rates,	-	-	21.85
			<hr/>
			76.74
			<hr/>
			\$ 338.56
Purchase money in Court,	-	-	1,420.00
			<hr/>
Remaining for distribution,	-	-	\$1,081.44
			<hr/>
Plaintiff's half of this,	-	-	\$ 540.72
Stephen Starr, share,	-	-	\$263.46
Elizabeth Starr, “	-	-	6.90
Thomas Starr, “	-	-	263.81
Mary Jane Starr, “	-	-	6.55
			<hr/>
			540.72
			<hr/>
			<u>\$1,081.44</u>

From the plaintiff's share should come, and be paid out of Court to the defendants, Stephen and Thomas Starr, the costs of the present appeal to be taxed.

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THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY.

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Life Insurance—Application for—Issue of Policy—Completed Contract—Ante-dating Policy—Policy Not to Take Effect Before First Payment of Premium—Due Dates of Premium.

The initialling of an application for insurance by officers of an insurance company, though indicating acceptance of the risk, does not without communication of the fact to the applicant constitute any contract with him.

If a policy is afterwards prepared and the applicant informed that it is ready for him, this will constitute an acceptance of the original application; and such policy may be properly antedated to the date of the application.

A provision in the application and policy, that the insurance shall not be binding on the company, or the policy go into effect until payment of the first premium, will not postpone or affect the due dates at which the respective premiums will fall due, so as to make them different from those mentioned in the policy.

Per BOYD, C.—Acceptance of the policy by the applicant without objection after paying his first premium, and a subsequent payment of the second premium by him according to the terms of the policy, is cogent, and after his death conclusive evidence of his consent to the contract as expressed in the policy.

THIS was a special case in reference to a claim made on a policy of life insurance under the circumstances set out in the judgment of FERGUSON, J.; and by agreement of the parties, under Con. Rule 117, was heard before a Divisional Court consisting of BOYD, C., and FERGUSON, J., on September 11th and 12th, 1901.

J. K. Kerr, K.C., for the plaintiff, contended that the application had been accepted and so a contract constituted, and that the policy must be amended if necessary to conform to it; that the payment of the first premium on October 4th, 1897, first

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brought this contract into force calling for semi-annual premiums dating from that day; that the payment of February 26th, 1898, was not due till April 4th, 1898, and continued the policy till October 4th, 1898, and during the thirty days of grace allowed a tender was made of the premium: *Canning v. Farquhar* (1886) 16 Q.B.D. 727; R.S.O. 1897, ch. 203, sec. 2, subsecs. 37, 41, 54; that the only insurance contract binding on the plaintiff was that thus founded on the application: *Buck v. Knowlton* (1892) 21 S.C.R. 371; *Western Assurance Co. v. Provincial Insurance Co.* (1880), 5 A.R. 190; that the insured was entitled to rely on the company making the policy follow the application: *Mowat v. Provident Savings Life Assurance Society* (1900), 27 A.R. 675, at pp. 684, 692; *The Liverpool and London and Globe Insurance Co. v. Wyld* (1877), 1 S.C.R. 604; *Fitz Randolph v. Mutual Relief Society of Nova Scotia* (1890), 17 S.C.R. 333, at p. 336; May on Insurance, 4th ed., sec. 144 d, n. a; that every policy is to be read most strongly against the insurer: *Anderson v. Fitzgerald* (1853), 4 H.L. 484; *Fowkes v. Manchester and London Life Assurance and Loan Association* (1863), 3 B. & S. 917, at pp. 925-6; and that the plaintiff was entitled to relief, whether it be put on the ground of fraud or of mistake: *Collett v. Morrison* (1851), 9 Ha., at p. 173; *The Aetna Life Insurance Co. v. Brodie* (1880), 5 S.C.R. 1; *Richardson, Spence & Co. v. Rowntree*, [1894] A.C. 217; *Robertson v. The Grand Trunk R.W. Co. of Canada* (1895), 24 S.C.R. 611; *Fireman's Fund Insurance Co. v. Norwood* (1895), 69 Fed. 71; Pollock on Contracts, 6th ed., pp. 46-7.

A. H. Marsh, K.C., for the defendants, contended that the action was prematurely brought, as proofs of death were not furnished until after its commencement: *Home Life Association of Canada v. Randall* (1899), 30 S.C.R. 97; that the English practice of not issuing policies till after the payment of the premium does not prevail here or in the United States; that any ambiguity in the application in this case was over-ridden by the clear terms of the policy; that here there was no completed contract preceding the policy, nor any mistake or fraud: *McNeill v. Haines* (1889), 17 O.R. 479; *Mackenzie v. Coulson* (1869), L.R. 8 Eq. 368, at p. 375; that it was clear the parties intended to contract by policy, and even communication of the

acceptance of the application would not therefore have made a complete contract: *Paine v. Pacific Mutual Life Insurance Co.* (1892), 51 Fed. 689, especially at p. 693; *Equitable Life Assurance Society v. McElroy* (1897), 83 Fed. R. 631, especially at p. 642; that certainly it was not till notification that the policy was ready, that there was any contractual relation between the parties: *Travellers Insurance Co. of Hartford v. Henderson* (1895), 69 Fed. 762; *Chicago, etc., R. W. Co. v. Belliwith* (1897), 83 Fed. 440; *Quinlan v. Providence Washington Insurance Co.* (1892), 133 N.Y. (C.A.), at pp. 364-5; that the very point of this case had been determined in *McConnell v. Providence Savings Life Assurance Society of New York* (1899), 92 Fed. R. 769, following *McMaster v. New York Life Insurance Co.* (1897), 78 Fed. R. 33; S.C. 87 *ib.* 63, 90 *ib.* 40; 99 *ib.* 856.

Kerr, in reply, contended that the defendants by repudiating all liability waived the requirements of an allowance of 60 days after the proofs of loss; and referred again to *Fireman's Fund Insurance Co. v. Norwood*, 69 Fed. 71, and to *Morrow v. Lancashire Insurance Co.* (1898), 29 O.R. 377, at p. 382.

November 16, 1901. FERGUSON, J.:—Gamble D. S. Armstrong made an application to the defendants for a policy upon his life for the sum of \$2,000, the same to be what was known as a twenty years renewable term policy. This was to be for the benefit of the applicant's mother, Sophia Amelia Armstrong, the present plaintiff. The application was sent from Toronto, and appears to have been received at the head office of the defendants in New York as early as August 23rd, 1897. On that day certain officers of the company put initial letters upon the application, and from these it was contended that there had been an acceptance of the application and an insurance contract completed. This contention was for the purpose of claiming the issue of a policy in accordance with the terms of such supposed contract, it being contended that the policy that was issued by the defendants was not in accordance with the application. What appears may well indicate that the defendants' officers were satisfied with the application, but this was not at any time communicated to the plaintiff or the beneficiary, who acted in some of the matters at least appertaining

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to the proposed insurance as the agent of the applicant, and without such communication there could not be a completed contract: see *Equitable Life v. McElroy*, 83 Fed. R. 631 at p. 642; *Paine v. Pacific United Life*, 51 Fed. R. 689 at p. 693, and the cases there referred to; also Pollock on Contracts, 6th ed., p. 31. This proposition is perhaps too plain for discussion.

The defendants had a policy prepared and without any unreasonable delay forwarded it to their agents in Toronto where the applicant and his mother, the beneficiary, resided, for delivery. This policy bears date the 23rd of August, 1897. It was forwarded from New York on the 26th of the same month and received by Mr. Hunter, the Canadian manager and agent of the defendants in Toronto, on the 28th of that month, when, as admitted by the case, the plaintiff was informed by him that he had the policy. It is also admitted by the case stated that no communication was made by the defendants or by any one on their behalf, to the applicant or the plaintiff, or to any person on behalf of either of them, relative to the acceptance of the application until after the issue of the policy and its receipt in Toronto when Mr. Hunter informed the plaintiff as aforesaid that he had the policy.

It is also admitted that the course of dealing adopted in this instance was the ordinary course whereby the defendants considered and dealt with applications for insurances.

As already stated, it was contended that the policy was not drawn according to the application. I have read both documents and I am humbly of the opinion that the contention is not well founded. I think the policy does accord with the application and is just such a policy as any reasonable person would expect to have in answer to such an application. The application does not state all that is set forth in the policy, but this, I apprehend, is never the case.

I do not think there is any material difference between the application and the policy as was the case in *Mowat v. Provident Savings Life Assurance Society*, 27 A.R. 675, and I think the sending of the policy was an acceptance of the application, the first and only acceptance of it, and cannot be considered to be a counter proposal as was intimated. These two documents, as I think, constituted the insurance contract between the parties.

As to the policy bearing a date as early as the 23rd of August, I think the reasoning in the case *McConnell v. Provident Savings*, 92 Fed. R. 769, is much in favour of the defendants, perhaps conclusively so, if the reasoning be adopted, as I think it should be. In the present case, as in that case, there was no agreement or instructions as to what the date of the policy should be.

This policy was not in fact delivered till the 4th day of October, 1897, the delays arising from two causes, both of which, as it seems to me from the evidence made part of the special case, were attributable to the plaintiff and the applicant. One of them was the neglect and delay in payment of the first premium. This the beneficiary, who was acting for the applicant, says in her evidence was partly owing to neglect and partly to sickness in her family. The other was difficulty in obtaining a further "health certificate" from the applicant who had gone to British Columbia, and was there engaged, as I understand the evidence, with a railway surveying party. This difficulty seemed so great that the defendants finally consented to accept a certificate signed by the plaintiff as agent of the applicant and on her own behalf as the beneficiary, instead of one signed by the applicant himself.

In the application there is a provision expressed in these words: "That the insurance hereby applied for shall not be binding on the society until the first premium due thereon has been actually received by the said society or its authorized agent during my lifetime and good health" of the applicant. In the policy the provision is in these words: "This policy does not go into effect until the first premium thereon has been actually paid during the lifetime and good health of the assured." These two provisions are, as I think, to the same effect, the meaning being that should the death of the applicant occur before the payment of the first premium there would, in that case, be no insurance and the defendants should not be liable.

This, however, is not the view taken by the plaintiff, who contended that as the first premium was not in fact paid till the 4th of October, 1897, that point of time must be considered the commencement, and that the half-yearly payments were to be made each half year after that day, that is to say, on the 4th

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of April and October in each year instead of the 23rd of February and 23rd of August in each year as provided in the policy. The plaintiff, acting for the applicant, paid, as before stated, the first premium on the 4th of October, 1897, and received a receipt for it dated the 23rd of August, 1897, which she retained and kept. This on its face states that the payment is up to the 23rd day of February, 1898. On the 26th day of February, 1898, she paid the second premium and was given a receipt stating that this was the amount required to cover the February premium, and another receipt (from the head office) stating that this was the premium due the 23rd of February, 1898. Both of these receipts she retained and kept. These, as well as the other receipt above mentioned, are parts of the case.

The third half-yearly premium was tendered on the 17th day of October, 1898, and not before, and was refused by the defendants, their contention appearing to be that this premium should have been paid on the 23rd day of August, 1898, or within the 30 days thereafter, the policy allowing 30 days' grace in the payment of premiums. The contention of the plaintiff is that this premium did not fall due till the 4th of October, 1898, and that the tender of it was in good time, it being within the thirty days thereafter.

It is not disputed that if this tender was not in good time, or, in other words, there was default in payment of this premium, the defendants were not bound to continue or rather renew the insurance, and the defendants refused to continue or renew it.

On the case I am of the opinion that the third premium fell due on the 23rd day of August, 1898, and, as a consequence, the tender of it was too late and the defendant's contention the right one.

The policy provides that the failure to pay any annual premium or instalment thereof as specified when due will terminate the policy.

The assured died on or about the 20th day of October, 1898.

I am, for reasons that I have endeavoured to give, of the opinion that the plaintiff is not entitled to recover, and the consequence is that the action should be dismissed with costs.

I think the action should be dismissed with costs.

There is, however, another and separate reason which was urged for dismissing the action. The special case admits that the plaintiff, who is the administratrix of the estate of the insured as well as the beneficiary in the policy, did not furnish any proofs of the death of the insured till after the commencement of this action, viz., on the 19th day of April, 1899.

The agreement in the policy is to pay "within eighty days" after receipt of satisfactory proofs of the death of the assured. From this it would appear that the action was premature and should for this reason be dismissed, and, I suppose, with costs.

On the whole case I think the action should be dismissed with costs.

BOYD, C.:—My brother Ferguson has very fully set forth the facts of this case and his conclusions upon the law applicable thereto, and I agree generally in his results. The action, in my opinion, must fail on the merits.

I find no evidence of any prior agreement on which there might be based jurisdiction to reform the policy. The matters pertaining to the issue of the policy were by way of application, and the acceptance by the officers of the company was not for the purpose of informing the applicant but for the guidance of their own sub-officials in preparing the proper policy. This official acceptance was never made known to the applicant, nor was it ever intended that he should be informed of it. There is, in my opinion, no evidence of any concluded contract until the acceptance of the policy by the applicant. This was consequent upon the contemporaneous payment of the first premium and the delivery of the policy on the 4th of October, 1897. That policy bore date August 23rd, 1897, that being the date when the application was received at the head office in New York—at which time also some officers of the company marked it approved—though the final act of acceptance was not till August 25th, 1897.

However, that policy as drawn up and issued signified this contract as understood by the company, and the receipt of the policy after the first payment, accompanied by the silence implying the satisfaction of the applicant and the consequent payment of the second premium according to the terms of the

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policy, is cogent and indeed after his death conclusive evidence of his assent to the contract as expressed by the company in this policy.

In England it appears to be usual after the directors have accepted the proposal to give notice of that to the applicant and then call upon him for the payment of the premium. Hence it is said in *Collett v. Morrison*, 9 Ha. 173, if there is an agreement for a policy in a particular form and the policy be drawn up in the office in a different form, varying the right of the party assured, a court of equity will interfere and deal with the case on the footing of the agreement and not of the policy. Here, however, the difference is that there is no prior agreement to reform by.

Again, as said by Lord Cranworth in *Xenos v. Wickham* (1867), L.R. 2 H.L. 296 at p. 324: "It is not the practice that the assured should call for and examine the policy before he takes it away but that he should send for it evidently treating it as an instrument complete before it is taken away from the office. If when it has been sent to him, he should discover that it is not conformable to the slip, his only remedy would be a remedy in equity to get it corrected according to the real meaning of the parties."

Here, as I have said, the contemporaneous and the subsequent conduct of the insured indicates very clearly his acceptance of the policy and his willingness to pay on the days therein provided for payment of later premiums. No case exists to reform.

It is admitted that the policy was issued according to the ordinary course of the company. I observe that in *Collett v. Morrison* the same method was pursued as in this case. There the application was on September 9th, 1844, and the proposal was on September 16th accepted by the directors and notice given to applicant. The premium for the year was paid on September 19th and a policy signed bearing date September 9th, and it was expressed therein that the premium had been paid for twelve calendar months commencing on the day of the date of the policy: 9 Ha. p. 164.

I perceive no incongruity between the application and the policy if they be read together as one instrument. The application is for a 20 years' renewable term policy with premiums

payable semi-annually. And the applicant therein agrees that the assurance applied for shall not become binding on the society until the first premium is actually paid. The policy is drawn up of date 23rd of August, 1897, and it is said to be granted in consideration of the payment in advance upon delivery of this policy of \$13.38 and of the payment thereafter of \$13.38 on or before the 23rd day of February and August in every year during the continuance of the policy. This is plainly and unambiguously expressed and accords with the application, and no one would misunderstand the obligation incurred.

All the American law is collected in the elaborate discussions upon this very controversy in the case of *New York Life Insurance Co. v. McMaster*, 87 Fed. R. 63; *McMaster v. New York Life Insurance Co.*, 99 Fed. R. 856; and *McConnell v. Provident Life*, 92 Fed. R. 769, in which the conclusions were conformable to that herein arrived at.

The action stands dismissed as agreed upon in the special case, with costs.

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END OF VOLUME II.

APPENDIX.

Reported cases from Ontario disposed of by the Judicial Committee of the Privy Council and the Supreme Court of Canada since the publication of Volume 1 O.L.R.

ASH v. METHODIST CHURCH, 27 A.R. 602.—Appeal dismissed. See 31 S.C.R. 497.

BIGGS v. FREEHOLD LOAN AND SAVINGS COMPANY, 26 A.R. 232.—Appeal allowed. See 31 S.C.R. 136.

CODE v. UNION BANK, 27 A.R. 396.—Appeal dismissed. See 31 S.C.R. 594.

EARLE v. BURLAND, 27 A.R. 540.—Judgment of the Court of Appeal varied (P.C.). See [1902] A.C. 83.

JAMES v. GRAND TRUNK RAILWAY, 1 O.L.R. 127.—Appeal allowed. See 31 S.C.R. 420.

MORRIS v. UNION BANK, 27 A.R. 396.—Appeal dismissed. See 31 S.C.R. 594.

SOPER v. LITTLEJOHN, 1 O.L.R. 172.—Appeal allowed. See 31 S.C.R. 572.

WILSON v. HOTCHKISS, 2 O.L.R. 261.—Appeal dismissed. See 31 S.C.R. 481, *sub. nom. Milburn v. Wilson*.

OTTAWA ELECTRIC CO. v. ST. JACQUES, 1 O.L.R. 73.—Appeal allowed. See 31 S.C.R. 636.

ROBINSON v. MANN, 2 O.L.R. 63.—Appeal dismissed. See 31 S.C.R. 484.

BROWN v. LONDON STREET RAILWAY COMPANY, 2 O.L.R. 53.—Appeal allowed. See 31 S.C.R. 642.

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ACTION.

Illegal Distress — Parties — Bailiff in Possession for Mortgagee.]—See ASSESSMENT AND TAXES, 1.

Survival of—Fatal Accidents Act.]—See EXECUTORS AND ADMINISTRATORS, 3.

ALIMONY.

1. *Lunatic — Admission to Asylum under R.S.O. 1897 ch. 317, sec. 12—Removal by Wife's Relatives.*]—A husband on two occasions procured the release of his wife from the Provincial lunatic asylum, where he had obtained her admission as a lunatic. After her second release she grew worse, becoming violent and dangerous, and he applied for her admission, which was refused, the authorities declining to receive her except as a "warrant patient," whereupon he took proceedings under sec. 12 of R.S.O. 1897 ch. 317, which resulted in her being committed to gaol as a dangerous lunatic, from whence she was transferred to the asylum. The wife's relatives then applied to the Lieutenant-Governor and obtained her release, and she went to live with them, and claimed alimony in this action:—

Held, that an action therefor would not lie. *Hill v. Hill*, 289.

2. *Lunatic — Admission to Asylum—Removal—Summary Judgment—Rule 616.*]—*Held*, affirming the decision of Meredith, C.J., 2 O.L.R. 289, that the plaintiff was not entitled to alimony.

Held, also, that, upon a motion by the plaintiff for summary judgment under Rule 616, where all the facts were before the Court, and the conclusion was against the plaintiff, it was proper to pronounce judgment dismissing the action, instead of merely dismissing the motion. *Hill v. Hill*, 541.

APPEAL.

Conditional Allowance of—Reduction of Damages—Election—Further Appeal.]—After the plaintiff's damages had been assessed by a jury, the trial Judge dismissed the action. The plaintiff appealed, and the Court of Appeal ordered that, if the plaintiff elected to reduce the damages assessed by the jury, her appeal should be allowed with costs, and judgment entered for her for the reduced amount with costs, or otherwise that there should be a new trial:—

Held, that the plaintiff was entitled to have a clause inserted in the order of the Court protecting her, in the event of an appeal by the defendant to the Supreme Court of Canada, against her election to reduce the damages. *Fahey v. Jephcott*, 353.

APPOINTMENT.

Deed of—Grantee to Uses.]—*See* LIMITATION OF ACTIONS, 2.

ARBITRATION AND AWARD.

1. *Case Stated by Arbitrators—Time—Remission to Arbitrators—R.S.O. 1897 ch. 62, secs. 11 and 41.*]—An application to the Court by one of the parties to an arbitration, under sec. 41 of the Arbitration Act R.S.O. 1897 ch. 62, for an order directing the arbitrators to state a case for the opinion of the court as to the admissibility and relevancy of evidence before them must be made before the execution of the award, and it is too late for them to state a case under that section after the award is made. The Court will not remit the matter to the arbitrators for reconsideration on the ground of mistake unless the mistake appears on the face of the award, or unless the mistake is admitted by the arbitrators. Where after an award was made two of the arbitrators certified that they had admitted and considered certain evidence, the admissibility of which they considered doubtful, the Court

refused to remit under sec. 11 of the above Act the matters in question in the arbitration. *Re An Arbitration between Montgomery, Jones & Co., and Liebenthal & Co.* (1898), 78 L.T.N.S. 406, specially considered. *Re Grand Trunk R. W. of Canada v. Petrie*, 284.

2. *Insurance Policy—Provision for Appointment of Arbitrators—R.S.O. 1897, ch. 62, sec. 8 (O).*]—A guarantee policy of insurance made by the defendants in favour of the plaintiffs contained a provision that if any difference should arise in the adjustment of a loss the amount should be ascertained by two disinterested persons, one to be chosen by each party; and on their disagreement, the two should chose a third, the award of the majority to be sufficient. Differences having arisen, the plaintiffs appointed their arbitrator, of which they notified the defendants, and required them to appoint theirs, which they refused to do. Thereupon, the plaintiffs, acting under sec. 8 of R.S.O. 1897, ch. 62, appointed their arbitrator sole arbitrator:—

Held, that this submission properly came within the terms of the statute. *Excelsior Life Insurance Co. v. Employers' Liability Assurance Corporation*, 301.

3. *Municipal Corporation—Purchase of Electric Light Plant—Appointment of Sole Arbitrator—Notice—Arbitration Act—Municipal Act.*]—By an

agreement between the town corporation and the assignor of the company for the establishment and operation for ten years of an electric light plant in the town, it was provided that the town might at any time during the ten years purchase the plant at a valuation fixed by three arbitrators, appointed by each party choosing an arbitrator and they two a third in case of dispute, or by a majority of them.

Where a submission provides that the reference shall be to two arbitrators, the Arbitration Act, R.S.O. 1897, ch. 62, sec. 8 (b), gives power to the party who has appointed an arbitrator (if the other makes default as specified) to appoint that arbitrator as sole arbitrator; and it is provided that the Court or Judge may set aside any such appointment:—

Held, that notice of the appointment of the sole arbitrator should be given to the party in default, who, if not notified, is not called upon to move against the appointment.

Held, also, that the agreement was not to be read as suspending the choice of a third arbitrator till there should be a dispute, but it imported that the three arbitrators should act from the outset; and therefore sec. 8 (b) did not apply.

Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation (1901), 2 O.L.R. 301, and *Gumm v. Hallett* (1872), L.R. 14 Eq. 555, considered.

Seem, that the arbitration was under the Municipal Act, and sec. 8 of the Arbitration Act was not applicable at all: R.S.O. 1897, ch. 223, sec. 467. *Re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls*, 585.

Special Case--Proper Forum.]
—See COURT.

ARREST.

Application for Discharge—Onus—Intent to Defraud—Former Absconding—Insolvency—Bond—Restoration.]
The expected departure from Ontario with intent to defraud is an essential ingredient of the case to be made out by the applicant for an order of arrest, but it is a question of fact, and the Judge may infer it from the facts and circumstances shewn by the affidavits. The decision of the Judge who grants such an order is subject to review, but the onus of shewing that he was wrong rests upon the party who complains of it. Under the circumstances of this case the order was rightly made. The former conduct of the defendant in respect to the same debt was a fact or circumstance to be taken into consideration on the question of intent. The impecunious or insolvent condition of the defendant does not, of itself, minimize or rebut the fraudulent intent.

Decision of a Divisional Court, 19 P.R. 207, reversed.

Held, also, that the order of

the Court below directing that the bond given by the defendant should be delivered up and the surety therein released, was erroneous; the bond ought to have remained upon the files of the Court, being a record thereof; and the order ought only to have directed that an *exoneretur* be entered thereon; therefore the bond should be restored. *Beam v. Beatty*, 362.

ASSESSMENT AND TAXES.

1. *Personal Property — Illegal Distress*—*R.S.O. 1897, ch. 224, sec. 135 a (1) 3.*—Under sec. 135 a (1) 3 added to the Assessment Act, *R.S.O. 1897, ch. 224*, by 62 Vict. (2) ch. 27, sec. 11, goods which are not in the possession of the person assessed in respect to them cannot be distrained for the taxes assessed against them.

In this case the goods, which had been mortgaged, were when seized in possession of the bailiff of the mortgagee, who had taken possession upon default:—

Held, that the plaintiff being a bailiff in possession, had a right to bring action for illegal distress. *Donahue v. Campbell*, 124.

2. *Sale for Taxes—Validity of Assessment—Lien for Purchase Money*—*R.S.O. 1897, ch. 224, sec. 218.*—Section 218 of the Assessment Act, *R.S.O. 1897, ch. 224*, which gives a tax purchaser a lien for the purchase money paid by him and the ten per cent. thereon, has no appli-

cation where the taxes have not been lawfully imposed, or where there are no taxes in arrear.

On appeal to the Divisional Court, the judgment, reported in 32 O.R. 274, was varied by holding that the lands had been validly assessed for the years 1892 and 1893, and that the defendant therefore had a lien for the amount of the purchase money to the extent of the taxes for those years, with costs and expenses, ten per cent. interest, and the taxes subsequently paid, with like interest. In other respects the judgment was affirmed. *Wildman v. Tait*, 307.

3. *Exemptions — Trustees — Income.*—Under sec. 46 of the Assessment Act, *R.S.O. 1897 ch. 224*, the income derived from property vested in trustees must be regarded for the purpose of assessment as their own income, and is subject to assessment although the trustees have no personal interest in it. Its ultimate destination and mode of expenditure are immaterial, and the obligation of the trustees to pay it to the beneficiaries is not a debt to be offset against it.

Quære, whether the amendment to the section by 63 Vict. ch. 34, sec. 3 (O.), affects the question.

Judgment of McDougall, Co. J., affirmed. *In re McMaster Estate Assessment*, 474.

4. *Distress — "Owner" — Agreement for Purchase—Part Performance—Local Improvement Rates—Abandonment of Distress*—*R.S.O. 1897 ch. 224*,

secs. 24, 60, 129, 133-135.]—A purchaser who has gone into possession and made part payment of the purchase money under an agreement for the sale of land unexecuted by the vendor, which provides for payment by the purchaser of the taxes, rates and assessments rated or charged from the date of the agreement is an "owner" within the provisions of sec. 135 of the Assessment Act, and is liable for the taxes accruing during his occupancy, although they may have been assessed against a former owner. Local improvement rates grouped with other taxes under the Assessment Act, and included in the collector's roll, are "taxes" in its broad sense and may be collected or realized by uniform statutory process.

A warrant of distress specifying two bailiffs is unobjectionable.

Upon the facts of this case where one bailiff had rightly entered and seized and had afterwards withdrawn by reason of the misstatements of the owner, it was held competent for another bailiff to return forthwith and continue the first lawful taking.

McDougall v. McMillan (1873), 25 C.P. 75 at p. 92, followed. *Sawers v. Corporation of City of Toronto*, 717.

ASSIGNMENTS AND PREFERENCES.

Bona-fides—Statutory Pre-

sumption.]—See BANKRUPTCY AND INSOLVENCY.

ATTACHMENT OF DEBTS.

Garnishee Resident out of Ontario—Jurisdiction.]—See DIVISION COURTS.

BAILMENT.

Fire—Damages—Sale of Goods.]—The defendants agreed to make for the plaintiff certain tools used in manufacturing hubs of a special kind, and, in consideration of being allowed to use the tools, to manufacture also a number of the hubs:—

Held, that the use of the tools was an unconditional appropriation thereof to the contract, so that the property in them had passed to the plaintiff; that while using them the defendants were bailees thereof for hire, and after ceasing to use them, gratuitous bailees; that the defendants having neglected to send the tools to the plaintiff after repeated requests were liable to him in damages; but that these damages were nominal only, and that the plaintiff could not, upon the destruction of the tools by an accidental fire while retained by the defendants, recover from them their value, that destruction not being damage such as might fairly and reasonably be considered as arising from the breach, or in contemplation of the parties.

Judgment of McMahon, J., affirmed. *Leggo v. Welland Vale Manufacturing Co.*, 45

BANKRUPTCY AND INSOLVENCY.

Bankruptcy and Insolvency—Assignments and Preferences—Presumption.—The statutory presumption of the invalidity of a preferential transfer of goods is rebuttable by shewing that it was entered into by the transferee in good faith and without knowing, or having reason to believe, that the transferor was insolvent.

Judgment of Falconbridge, C.J., affirmed on other grounds. *Dana v. McLean*, 466.

BANKS AND BANKING.

Bank Act, sec. 46—Inspection of Customer's Account—Evidence in Judicial Proceedings—Company—Manager—Private Liabilities—Winding-up—Position of Liquidator—Promissory Notes—Consideration—Impeaching—Account—Acknowledgment of Correctness.—Section 46 of the Bank Act, 1890, 53 Vict. ch. 31 (D.), providing that "no person, who is not a director, shall be allowed to inspect the account of any person dealing with the bank," does not enable a bank to refuse to disclose its transactions with one of its customers, when the propriety of those transactions is in question in a court of law between the bank and another customer who attacks them, and shews good cause for requiring the information he seeks.

The company had an account with the bank (claimant), and

the manager of the company (who had power to sign notes for the company) had also an account at the same office of the bank. The claim of the bank against the company in winding-up proceedings included a number of promissory notes made by the manager and indorsed by the company. The liquidator shewed that notes so made and indorsed had been charged at maturity to the company's account by the direction of the manager, and that renewals of these notes formed part of the bank's claim:—

Held, that the liquidator, in examining the agent of the bank for the purpose of shewing that the original consideration for several of the notes included in the bank's claim was an advance to the manager for his own private purposes, and that the agent, knowing these notes to be the private debt of the manager, had, at his request, charged them to the company's account, was entitled to refer to the manager's own account with the bank, though the manager was not a party to the proceeding; more especially as the bank had set up certain transfers of cash from one account to the other as justifying them in charging the company's account with the manager's liabilities.

Held, also, that there was nothing to prevent the liquidator, who stood in the place of the company, from impeaching the consideration for the notes offered in proof by the bank,

just as the company itself might have done, but no farther.

Held, also, that periodical acknowledgments given by the manager of the bank of the correctness of the company's account could not be set up as a bar to an inquiry into the account, where specific errors in it were charged, to the knowledge of the bank. *Re Chatham Banner Co., Bank of Montreal's Claim*, 672.

BENEVOLENT SOCIETY.

Misstatement of Age — Rules Regulating Mode and Amount of Payment.]—A benevolent society's certificate provided for payment to the plaintiff upon his total disability, or upon his attaining the age of seventy years, out of the total disability fund, in accordance with the laws governing the fund, sums not exceeding in the aggregate one thousand dollars. In his application, upon which it was declared the certificate was founded, the plaintiff gave his age as fifty-four when it was in fact fifty-five, the latter age being within the age allowed for entrance and the assessments and fees chargeable being the same for both ages. The plaintiff attained the age of seventy on the 10th of December, 1899, and brought this action on the 15th of May, 1900, asking for payment of \$1000. The jury found that the plaintiff's age was not material to the contract, and that the statement as to age was made in good faith

and without any intention to deceive:—

Held, that the certificate was binding, and that the plaintiff was entitled to payment thereunder upon, in fact, attaining the age of seventy, but that the "laws governing the fund" applied, though not set out, and that under them the plaintiff was entitled at the time of action brought only to a benefit of \$225.

Judgment of Rose, J., reversed. *Hargrove v. Royal Templars of Temperance*, 79.

BILLS OF EXCHANGE.

1. *Equitable Assignment — Trust—Private Banker—Bills of Exchange Act*, 53 Vict. ch. 33, secs. 72 (2), 74 (D.).]—The owner of certain lands, subject to a mortgage made by him, conveyed the property on certain conditions, among which were that the grantee should pay him an annuity, and pay a certain proportion of the mortgage, the mortgagor remaining liable for the balance. Subsequently, and in order to pay his share of the mortgage money, the mortgagor signed an order on a private banker with whom he had a deposit account, payable to the mortgagee or bearer, which he then delivered to the banker, who, although he informed the mortgagee that he had the money of the mortgagor to pay him, did not tell him of the existence of the order. On being shewn the

order and informed of what the mortgagor had done, the grantee paid the amount of the annuity then due. Afterwards, and before the money was paid over by the banker to the mortgagee, the mortgagor died:—

Held, by FALCONBRIDGE, C.J. Q.B., that under sec. 72, sub-sec. 2 and sec. 74 of the Bills of Exchange Act, 53 Vict. ch. 33 (D.), the document being drawn on a private banker, was not a cheque but a bill of exchange, and that it was not revoked by the drawer's death.

On appeal to the Divisional Court, the judgment was affirmed on the ground that the transaction amounted either to an equitable assignment of the amount or a trust to pay over the same to the mortgagee, which became irrevocable on its being communicated to the parties and assented to by them. *Trunkfield v. Proctor*, 326.

2. *Notice of Dishonour—Sufficiency—Husband and Wife.*]—Notice was given to one of the indorsers of a promissory note on the day after maturity, as follows:—"I beg to advise you that . . . Mr. ——'s note for \$3,500 in your favour and endorsed by yourself and wife, and held by our estate, was due yesterday. As I have not received renewal, will you kindly see that same is forwarded with cheque for discount, as there is no surplus on hand:—

Held, a sufficient notice of dishonour to the indorser to

whom it was addressed, and also to his wife as he was her agent. *Counsell v. Livingston*, 582.

3. *Alteration—Joint and Several Liability—Principal and Surety—Judgment.*]—The insertion by the holder of a promissory note signed by several persons, some of whom are sureties for the others, of the words "jointly and severally" before the words "promise to pay" is a material alteration which avoids the note, and the subsequent cancellation of the words by the holder does not do away with the effect of the alteration, even though the makers of the note do not know of the alteration until after the cancellation.

A promissory note made by several persons, some of whom are sureties, given to the holder after such alteration in renewal of the original promissory note, and in ignorance thereof, cannot be enforced as against the sureties, there being no consideration to support it.

Accepting in renewal of a promissory note, some of the makers of which are to the knowledge of the holder sureties, of a promissory note not signed by one surety discharges the co-sureties.

A judgment recovered against debtors in their firm name for a firm debt is not a bar to the recovery of judgment against them individually upon a promissory note given by them as collateral security for the same debt.

Judgment of Street, J., varied.

Banque Provinciale v. Arnoldi, 624.

Conditional Delivery — *Notice—Innocent Holder.*] — See SUMMARY JUDGMENT, 2.

Endorsement before Payee—Chattel Mortgagee.] — See CHATTEL MORTGAGE, 1.

Promissory Note—Holder for Value—Fraud — Onus.] — See SUMMARY JUDGMENT, 1.

BILLS OF SALE AND CHATTEL MORTGAGES.

See COMPANY, 6.

BUILDING CONTRACT.

Certificate of Superintendent—Extras.] — See CONTRACT.

CAPIAS.

Intent to Defraud—Onus—Bond—Exoneretur.] — See ARREST.

CASES.

Arbitration between Montgomery, Jones & Co., and Liebenthal & Co., Re An. 78 L.T.N.S. 406, specially considered.] — See ARBITRATION AND AWARD, 1.

Attorney-General v. Theobald, 24 Q.B.D. 557, distinguished.] — See REVENUE.

Attorney-General of Duchy of Lancaster v. London and North Western R. W. Co., [1892] 3 Ch. 274, followed.]

See PLEADING, 3.

Aveson v. Kinnaird, 6 East 188, 193, followed.] — See MASTER AND SERVANT, 2.

Baxter v. France, [1895] 1 Q.B. 455, 458, specially referred to.] — See PRACTICE, 3.

Baxter v. France (No. 2), [1895] 1 Q.B. 591, distinguished.] — See PRACTICE, 3.

Cameron v. Hutchison, 16 Gr. 526, applied.] — See MORTGAGE, 1.

Chesterfield's Trusts, In re Earl of, 24 Ch. D. 643, applied.] — See EXECUTORS AND ADMINISTRATORS, 4.

Cowan v. Allen, 26 S.C.R. 292, followed.] — See WILL, 4.

Dodge v. Smith, 1 O.L.R. 46, approved of.] — See DEFAMATION, 2.

Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation, 2 O.L.R. 301, considered.] — See ARBITRATION AND AWARD, 3.

Faulds v. Harper, 11 S.C.R. 639, followed.] — See MORTGAGE, 1.

Fuller v. Alexander, 47 L.T.N.S. 443, followed.] — See SUMMARY JUDGMENT, 1.

Gumm v. Hallett, L.R. 14 Eq. 555, considered.] — See ARBITRATION AND AWARD, 3.

Guyot v. Thompson, 11 R.P.C. 541, followed.] — See PATENT FOR INVENTION, 1.

Hewitt v. Cane, 26 O.R. 133, distinguished.] — See MANDAMUS.

Homewood v. City of Hamilton, 1 O.L.R. 266, considered.]—See WAY.

Illingworth v. Spaulding, 43 Fed. R. 827, approved.]—See PATENT FOR INVENTION, 1.

Jackson v. Hyde, 28 U.C.R. 294, explained.]—See MEDICINE AND SURGERY.

Jennings v. Grand Trunk R. W. Co., 11 P.R. 300 overruled.]—See PARTICULARS.

Kellaway v. Bury, 66 L.T. N.S. 599, followed.]—See PLEADING, 3.

Lellis v. Lambert, 24 A.R. 653, specially referred to.]—See PRACTICE, 1.

London and Brighton R. S. Co. v. Truman, 11 App. Cas. 45 followed.]—See RAILWAYS, 2.

McCabe v. Middleton, In re, 27 O.R. 170, distinguished.]—See DIVISION COURTS.

McDougall v. McMillan, 25 C.P. 75, at p. 92, followed.]—See ASSESSMENT AND TAXES, 4.

McMillan v. McMillan, 21 Gr. 594, distinguished.]—See WILL, 8.

Morley, In re, Morley v. Haig, [1895] 2 Ch. 738, applied.]—See EXECUTORS AND ADMINISTRATORS, 4.

Olivant v. Wright, 1 Ch. D. 346, followed.]—See WILL, 4.

Partlo v. Todd, 17 S.C.R. 196, followed.]—See TRADE-MARK.

Reddaway v. Banham, [1896]

A.C. 199, applied.]—See TRADE-MARK.

Regina v. Fry, 24 C.P. 78, distinguished.]—See MANDAMUS.

Rex v. Foster, 6 C. & P. 325, followed.]—See MASTER AND SERVANT, 2.

Roberts v. Taylor, 31 O.R. 10, overruled.]—See MASTER AND SERVANT, 3.

Robson v. Jardine, 22 Gr. 420, followed.]—See WILL, 8.

Steam Stone Cutter Co. v. Shortsleeves, 4 Ban. & Ard. 364, approved.]—See PATENT FOR INVENTION, 1.

Sutherland-Innes Co. v. Romney, 30 S.C.R. 495, considered and followed.]—See DRAINAGE, 2.

Tennant v. Trenchard, L.R. 4 Ch. 537, 546; 38 L.J. Ch. 661, followed.]—See TRUSTEE.

Thompson v. Trevanion, Skin. 402, followed.]—See MASTER AND SERVANT, 2.

Thornhill v. Manning, 1 Sim. N.S. 451, followed.]—See MORTGAGE, 3.

Twiggs Estate, Re, [1892] 1 Ch. 579, followed.]—See DEVOLUTION OF ESTATES ACT, 1.

Van Grutten v. Foxwell, [1897] A.C. 658, followed.]—See WILL, 8.

Verulam v. Bathurst, 13 Sim. 374, followed.]—See WILL, 8.

William Lamb Manufacturing Co. of Ottawa, Re, 32

O.R. 243, dissented from.]—*See* COMPANY, 5.

CHATTEL MORTGAGE.

1. *Endorsement of Note—Bills of Exchange and Promissory Notes.*]—While the endorsing by a person, not a party to a note, of his name upon it before it has been endorsed by the payee is not an endorsement in the legal sense so as to make that person legally liable to the payee, a chattel mortgage to the intending endorser to secure him against the liability intended to be incurred cannot be set aside by the mortgagor's assignee for creditors after the mortgagee has paid the note in question.

Judgment of Meredith, J., affirmed. *Robinson v. Mann*, 63.

2. *Agreement for—Reading Agreement and Mortgage Together—Affidavit of Execution—Affidavit of Mortgagee—Validity—R.S.O. 1897, ch. 148, sec. 11.*]—Where an agreement to give a chattel mortgage is duly registered under R.S.O. 1897, ch. 148, sec. 11, and the mortgage subsequently given and registered, the Act does not operate to merge the former in the latter. The two may stand together for mutual support; and when the mortgage is grafted on the agreement and recites it, the whole contract in its inception and completion may be regarded as one transaction, and read as one instrument.

In this case the affidavits

attached to the agreement were admitted to supply defects in those attached to the mortgage.

A chattel mortgage is not vitiated because the affidavit of execution makes a mistake in the name of one of the mortgagors, when it states the witness saw the mortgage executed by the parties thereto, and such executing parties are the proper parties.

Semble, a mortgagee who has taken his security upon paying off a prior mortgagee, not intending to do otherwise than take an assignment of the latter's securities, may fall back upon these should his own mortgage prove defective. *Fisher v. Bradshaw*, 129.

COMPANY.

1. *Winding-up—Petition for Order—Previous Demand—Service of Writ of Summons—Notice of Application.*]—Service of the specially indorsed writ of summons in an action against the company to recover the amount of a creditor's claim is not a sufficient demand in writing, within the meaning of sec. 6 of the Winding-up Act, R.S.C. 1886, ch. 129, to serve as the foundation for a petition by the creditor for a winding-up order.

Semble, that, as sec. 8 of the Act requires the petitioner to give four days' notice of his application, effect could not be given to a ground of which the company had not that notice.

Re Abbott-Mitchell Iron and Steel Co. (Limited), 143.

2. *Electric Light Company—R.S.O. 1897, ch. 200—Nuisance—Vibration—Injunction—Damages—R.S.O. 1897, ch. 207, secs. 9, 10, 13-20.*—An electric light company incorporated under the Ontario Companies Act, R.S.O. 1897, ch. 200, purchased a piece of land adjoining plaintiff's residence and erected a transforming and distributing power house thereon. By the working of the engines so much vibration was caused in the adjoining land as to render the plaintiff's house at times almost uninhabitable, and to create a nuisance though doing no actual structural injury. The company had no compulsory powers to take lands, and no opportunity had been afforded the plaintiff of objecting to the location of its works. Moreover, the company was under no compulsion to exercise its powers, nor was any statutory compensation provided for any injury of the character in question done by such exercise, nor was there any evidence that the company's powers might not have been exercised so as not to create a nuisance:—

Held, that the plaintiff was entitled to an injunction and a reference as to damages.

In their private Act, 61 Vict. ch. 68 (O.), the defendants incorporated secs. 13 to 20 of the Railway Act of Ontario, R.S.O. 1897, ch. 207, relating to the expropriation of land, but omit-

ted to incorporate sec. 9 of the last mentioned Act, by which a general power to take land is conferred, and sec. 10, by which a railway is entitled to make surveys and file a plan and book of reference:—

Held, that secs. 19 and 20 of the Railway Act of Ontario were unworkable by defendants as the powers of compulsory alienation given by sec. 20 do not arise until the map and book of reference have been deposited under sec. 10, but, assuming that secs. 9 and 10 were incorporated, as no plan or book of reference had been filed by defendants, they were without the protection afforded by the Act. *Hopkins v. Hamilton Electric Light and Cataract Power Co.*, 240.

3. *Promoters—Principal and Agent—Fraud—Deceit.*—While promoters of a company, as such, are not agents for each other, it may be shewn that one or more of them has or have been authorized to act as agent or agents for the others, and the ordinary responsibility of principals then attaches.

Therefore, where promoters who were to receive for their services paid up stock in a company to be formed, authorized two of their number to solicit subscriptions for shares, and these two, by means of false representations, induced the plaintiff to subscribe and pay for shares, the money being received and used by the promoters before the incorporation

of the company, the plaintiff was held entitled to repayment by the promoters of the amount paid.

Judgment of Armour, C.J., affirmed. *Wilson v. Hotchkiss*, 261.

4. *Subscription for Stock—Necessity for Allotment—Calls—British Columbia Companies Act, R.S.B.C. ch. 44, sec. 30—Ontario Companies Act, R.S.O. 1897, ch. 191.*—On September 1st, 1899, the defendant subscribed for shares in the plaintiff company by agreement covenanting with the company and directors to accept the same when allotted, and pay as calls might be made. The company was incorporated under the British Columbia Companies Act, 1897, which so far as affected this case is identical with the English Companies Act, 1862. On December 14th, 1899, the directors resolved that all shares should be called up, and between that date and November 22nd, 1900, many interviews took place between the president and the secretary-treasurer and the defendant, at which the latter's liability was discussed and demand for payment made, which also was demanded in several letters written by them to the defendant, but to which the defendant made no reply. On November 15th, 1900, the defendant wrote formally withdrawing his "offer" to take shares. In reply, the treasurer on November 22nd, 1900, again notified him for

immediate payment, and on November 29th, 1900, the directors passed by-laws for the issue and allotment of shares to the defendant to the number subscribed for, and also that the whole should be at once called up:—

Held, that the defendant was not liable on his shares, having withdrawn his subscription before allotment. *Nelson Coke and Gas Co. v. Pellatt*, 390.

5. *Winding-up — Application for Order—Previous Voluntary Assignment—Creditors—Discretion.*—The Court has a discretion to grant or withhold a winding-up order under sec. 9 of R.S.C. 1886, ch. 129.

Re William Lamb Manufacturing Co. of Ottawa (1900), 32 O.R. 243, dissented from.

Where the assets of the company were small, and the creditors had almost unanimously entered upon a voluntary liquidation under the Ontario Assignments Act, a petition for a compulsory winding-up order was refused. *Re Maple Leaf Dairy Co.*, 590.

6. *Winding-up — Claim against Assets—Lien on Goods Sold—Rights of Liquidator—Conditional Sales Act—Bills of Sale Act.*—The claimants sold the company a machine upon an order signed by the company, the conditions of which were that the company should pay a part of the price in cash and the balance in instalments, with interest on such instalments

payable with the last of them, and that the title should not pass to the company until the moneys payable by them under the order, as well as under any other orders which might be given by the company to the claimants, should be paid. At the time of the commencement of the winding-up of the company one instalment, the interest, and a further sum for goods ordered after the first order, remained unpaid. The liquidator came into possession of the machine, and sold it, subject to an alleged lien in favour of the claimants for the amount of the unpaid instalment only:—

Held, that the rights of the claimants under the contract still existed, and were not affected by the Bills of Sale and Chattel Mortgage Act nor by the Act respecting Conditional Sales of Chattels, nor by the liquidator's sale, and they were entitled to recover the full amount due under the terms of the order out of the estate. *Re Canadian Camera and Optical Co. A. R. Williams Co.'s Claim*, 677.

Manager—Private Commission — Profits.]—See MASTER AND SERVANT, 3.

CONDITIONAL SALES.

See COMPANY, 6.

CONTRACT.

Building Contract — Extras — Certificate of Superinten-

dent.]—A contract for the carpenter's work at the defendant's house provided that the contractor should be paid for work and extras, if any, on "certificate of superintendent of work." The contractor died after doing part of the work, and the plaintiffs thereupon agreed to deliver at the house "all the material referred to in the late (contractor's) contract, and all the conditions of that contract are to apply." The superintendent of work was a relation of and indebted in a large sum to the defendant, and the plaintiffs did not know this. Disputes having arisen, the superintendent of the work gave to the plaintiffs, under the defendant's instructions, a certificate that the plaintiffs had furnished all the material according to specifications, "except small matters which I will adjust under the terms of the contract." It was said by the defendant and the superintendent that this certificate had been given because they desired to get rid of the plaintiffs and to do the rest of the work themselves:—

Held, that as to extra material furnished by the plaintiffs, the condition as to the superintendent's certificate did not apply; and that, at all events, the certificate in fact given put an end to the contract and relieved the plaintiffs from doing anything further under it, so that the non-completion of the "small matters" in dispute formed no defence.

Held, also, *per* ARMOUR, C.J.O.,

that the relationships, family and financial, of the superintendent to the defendant should have been disclosed to the plaintiffs, and that under the circumstances the plaintiffs were not bound to obtain a certificate at all.

Judgment of Falconbridge, C.J., reversed. *Ludlam v. Wilson*, 549.

See BAILMENT.

CONVICTION.

Certiorari—Selling Meat Unfit for Food—First Proceeding under Criminal Code and then under Public Health Act—Excess of Jurisdiction—Evidence.]

—A defendant being charged with offering for sale, publicly, meat unfit for food, the magistrates treated the charge, though ambiguously worded, as one for an offence under the Criminal Code, sec. 194, and took evidence in support. They then concluded that an offence had been made out under a municipal by-law based on the Public Health Act, R.S.O. 1897, ch. 248, but not under the Criminal Code, and adjourned for a week "to enable the accused to put in a defence under the new conditions if he so decided." The defendant protested, and offered no defence, and was convicted under the by-law:—

Held, on certiorari, that the conviction must be quashed on the ground of want of jurisdiction; and also because, even if there was power to change the

charge to one under the Public Health Act, no evidence was given of the offence so charged after that charge was made.

It is not competent for magistrates where an information charges an offence which they have no jurisdiction to try summarily, to convert the charge into one which they have jurisdiction to try summarily, and to so try it on the original information. *Rex v. Dungey*, 223.

Quashing Order — Costs.]—
See JUSTICE OF THE PEACE.

COSTS.

1. *Scale of — Appeal from Judgment of Drainage Referee.*]

—The costs of an appeal to the Court of Appeal from the decision of the Drainage Referee in a proceeding under the Drainage Act initiated before him should (if awarded to either party) be taxed on the scale applicable to appeals in cases begun in the High Court of Justice.

Decision of a Divisional Court, 19 P.R. 188, reversed. *Re Township of Metcalfe and Townships of Adelaide and Warwick*, 103.

2. *Security for—Several Defendants — Præcipe Orders — Practice.*]

—One of the defendants having obtained on præcipe an order for security for costs, the plaintiffs complied with it by paying \$200 into Court, after which another defendant, without notice of the previous order or of the payment into Court thereunder, obtained

an order on præcipe for security for costs on his own behalf:—

Held, that the plaintiffs were entitled to obtain an order providing that the security given by them should stand as security for the costs of all the defendants, but were not entitled to have the second order for security set aside as irregular. *Syracuse Smelting Works v. Stevens*, 141.

See SECURITY FOR COSTS, 1, 2.

COURT.

Divisional Court—Single Judge—Proper Forum—Special Case—Arbitration Act—“Opinion”—“Final Decision”—Judicature Act, sec. 67, sub-sec. 1 (a)—Rule 117.]—A single Judge has no jurisdiction to pronounce the opinion of the Court upon a special case stated by arbitrators pursuant to sec. 41 of the Arbitration Act, R.S.O. 1897, ch. 62. The effect of cl. (a) of sub-sec. 1 of sec. 67 of the Judicature Act, R.S.O. 1897, ch. 51, and of Rule 117, is to require that such a case be heard before a Divisional Court, as being a proceeding directed by statute to be taken before the Court, and in which the decision of the Court is final. “The opinion of the Court” is a “decision,” though not a binding adjudication as to the rights of parties or a decision amounting to a judgment or order; it is a “final decision” because it is the end of the proceeding and cannot be

reviewed by the appellate Court. *Re Geddes and Cochrane*, 145.

Jurisdiction—Foreign lands—Trusts.]—See HIGH COURT OF JUSTICE.

COURT OF APPEAL.

Judgment—Certificate—Power to Stay Proceedings.]—After the decision of the Court of Appeal has been certified by the Registrar, the case is no longer pending in that Court, and, by Rule 818, the subsequent proceedings are to be taken as if the decision had been given in the Court below.

A Judge of the Court of Appeal has, therefore, no power, under the Judicature Act, R.S.O. 1897, ch. 51, sec. 54, or 60 & 61 Vict. ch. 34, sec. 1 (D), or otherwise, after certificate, to make an order staying proceedings upon the judgment pending a proposed application for leave to appeal to the Supreme Court of Canada. *Hargrove v. Royal Templars of Temperance*, 126.

CRIMINAL LAW.

1. *Fortune Telling—Criminal Code, sec. 396.*]—Deception is an essential element of the offence of “undertaking to tell fortunes” under sec. 396 of the Criminal Code, and to render a person liable to conviction for that offence there must be evidence upon which it may be reasonably found that the person charged was, in so undertaking, asserting or representing, with

the intention that such assertion or representation should be believed, that he had the power to tell fortunes, with the intent in so asserting or representing of deluding and defrauding others.

In this case the evidence set out in this report was held to be sufficient.

Judgment of the chairman of the general sessions of the County of York affirmed. *Rex v. Marcott*, 105.

2. *Procedure — Suspended Sentence—Estreating Recognizance—Good Behaviour—Crown Motion—Indictment for Libel—Fresh Libels—Private Prosecutor.*—Where a person has been released from custody on a criminal charge upon entering into a recognizance with sureties to appear and receive judgment when called on, it is only on motion of the Crown that the recognizance can be estreated, and judgment moved against the offender.

Where such a recognizance has been given in proceedings for libel, the publication of fresh libels against the prosecutor is no breach of good behaviour under such recognizance, for the defendant may have complete defences against such charges of libel, and the prosecutor must be left to his remedy by action or indictment. *Rex v. Young*, 228.

3. *Summary Trial—Powers of Magistrate—Theft—Attempt to Commit—Conviction—Des-*

cription of offence—Warrant of Commitment—Absence of—Order for Further Detention.]

—It is competent for a magistrate upon the summary trial before him of a prisoner charged under sec. 783 (a) of the Criminal Code with having committed theft, to convict him of the offence of attempting to commit it provided for in sub-sec. (b).

The offence of theft from the person is sufficiently described in popular language as “picking the pocket of a person.”

To authorize the detention of a person under a conviction there should be a warrant of commitment; but where there was none, and the conviction itself was lodged with the gaoler as his authority for the detention, there being an offence proved and a proper conviction for the offence, and no merits on the part of the prisoner, the Judge before whom the prisoner was brought upon *habeas corpus* exercised the power conferred by sec. 752 of the Code, and directed that the prisoner should be further detained, and that the convicting magistrate should issue and lodge with the gaoler a proper warrant. *Rex v. Morgan*, 413.

4. *Trial—Election as to Mode of—Withdrawal.*]

—Where a prisoner has been brought before a County Court Judge and has elected to be tried without a jury, he cannot afterwards be allowed to withdraw his election and to re-elect. *Rex v. Keefer*, 572.

Procedure—Summary Trial—Assault—Civil Action—Right to Maintain..]—See TRESPASS.

Quarter Sessions—Record of Acquittal—Defendant's Right to..]—See MANDAMUS.

CROWN.

Estreating Recognizances—Crown Motion..]—See CRIMINAL LAW, 2.

DAMAGES.

Line Fences—Agreement to keep in Repair—By-law—Liability..]—See LINE FENCES.

Loss by Fire..]—See BAILMENT.

DEFAMATION.

1. *Libel—“Blackmailing”—Innuendo—Onus of Proof—Contradictory Evidence—Non-suit after Finding by Jury in Plaintiff's Favour.*.]—The word “blackmailing” is libellous *per se* requiring no innuendo, and it does not lie upon the plaintiff to prove the falsity of the charge. For the purposes of the trial it is presumed in his favour, and the onus is on the defendant to prove it to be true if justification is pleaded.

Semble, per BOYD, C. The better view is that colloquial use has broadened the meaning of the word so that it may not have a criminal connotation.

In an action for two libels

where the words used in one were not libellous *per se* and were not, fairly taken, capable of the meaning alleged in the innuendo:—

Held, that the trial Judge was right who had, after motions made for a nonsuit both at the close of the plaintiff's case, and after all the evidence was in, on which he reserved judgment, given judgment dismissing the action after a verdict was rendered by the jury in favour of the plaintiff.

But as to the other, where the truth of the charge was not admitted by the plaintiff or proved on uncontroverted evidence, and where the evidence as to the use of the word “blackmailing” was contradictory:—

Held, that it was for the jury to pass upon the evidence, and the judgment dismissing the action on the ground that there was no evidence to go to the jury should be set aside and the verdict of the jury in favour of the plaintiff restored.

Judgment of Meredith, J., 32 O.R. 163, reversed in part. *McDonald v. Mail Printing Co.*, 278.

2. *Pleading—Justification—Particulars—Appeal—Res Judicata.*.]—The libel originally complained of in the statement of claim stated that the plaintiff had been cashiered from the army for cheating at cards, and also that divorce proceedings had been taken against him. The defendants pleaded

justification to the whole, and added two clauses to the same paragraph of their statement of defence, one of which related to the first charge and the other to the second. The first of these clauses was as follows: "The plaintiff was obliged to leave the army on the ground that he had cheated at cards, and stories of the peculiar character of the plaintiff's card-playing and of his having been cashiered from the army for cheating at cards were in circulation in the city of Vancouver." The plaintiff applied for an order striking out both these added clauses, but the application was refused on the ground that the defendants were entitled to plead them as particulars of the defence of justification. There was no appeal from this order, but the plaintiff amended (by leave) by striking out so much of his complaint as related to the divorce proceedings, and the defendants then struck out of their defence the second clause, relating to the divorce proceedings. An application was then made to strike out the first clause, that relating to the plaintiff being cashiered from the army, and was refused by the Master and by a Judge in Chambers on appeal:—

Held, per FALCONBRIDGE, C.J., that the plaintiff was not prejudiced by the clause; and, moreover, approving *Dodge v. Smith* (1901), 1 O.L.R. 46, that a second appeal was not to be encouraged in a case of this kind.

Per STREET, J., that the matter of the second application was *res judicata* by the order made on the first application and not appealed against. *Bateman v. Mail Printing Co.*, 416.

DEVOLUTION OF ESTATES ACT.

1. *Partial Intestacy—Non-disposition of Residuary Estate—Inapplicability of Act—R.S.O. 1897 ch. 127.*]—The Devolution of Estates Act, R.S.O. 1897, ch. 127, does not apply where there is a partial intestacy, as in this case, where a testator failed to dispose of his residuary estate.

Re Twigg's Estate, [1892] 1 Ch. 579, followed.[—*In re Harrison*, 217.

2. *Real Representative—Sale of Land—Lapse of Year—Vesting in Heirs—Injunction—R.S.O. 1897 ch. 127.*]—Letters of administration to the real estate of an intestate who died on October 18th, 1900, were issued to the defendant on October 14th, 1901. Prior to the latter date the defendant had advertised the lands for sale on October 22nd, 1901, on the day preceding which date, the plaintiff, one of the heirs, applied for an injunction to restrain the sale. No caution had been filed within the year nor did it appear that there were any debts of the deceased:—

Held, that the plaintiff was entitled to an injunction, for when the defendant advertised

the lands for sale he had no right to do so, and at the proposed time of sale he had no right to sell since by the operation of the Devolution of Estates Act the property had vested in the heirs.]—*Byer v. Grove*, 754.

DISCOVERY.

Examination of Plaintiffs—Specific Performance—Denial of Contract—Tender—Financial Means—Pleading.]—In an action for the specific performance of an alleged contract for the sale and purchase of a vessel for \$5,000, one-half of which was to be paid in cash at the execution of the bill of sale and delivery of the vessel, and credit given for the remainder of the purchase money without any security upon the vessel or otherwise, the plaintiffs alleged a tender to the defendants of \$2,500 in payment of the down instalment. Defences in denial of the contract and of fraud were, among others, set up:—

Held, that, as the defendants absolutely refused to carry out the contract, and denied their obligation to do so, the question whether there had been a tender in fact was immaterial, in an equity action such as this; and, therefore, the plaintiffs were not obliged upon examination for discovery to answer questions as to the source from which they had obtained the money alleged to have been tendered.

The defendants also sought to examine the plaintiffs as to their

means to shew that they were persons of no means, which, it was contended, would be a circumstance to induce the court to refuse to adjudge specific performance, even if the contract were proved.

Held, that the defendants were not entitled to such discovery, no such issue being raised upon the record, and it not being alleged that the contract was entered into upon the belief or representation that the plaintiffs were persons of means.

Certain parts of the statements of defence stating the plaintiffs' want of means and that the alleged tender was only a pretended one, were considered irrelevant, but were not struck out, because the plaintiffs had pleaded over.]—*Bentley v. Murphy*, 665.

Banks—Inspection of Customer's Account.]—See BANKS AND BANKING, 1.

DISTRESS.

Action for Illegal Distress—Bailiff in Possession for Mortgagee.]—See ASSESSMENT AND TAXES, 1.

DIVISION COURTS.

R.S.O. 1897 ch. 60, sec. 190—Garnishee Resident out of Ontario—Jurisdiction—Attornment.]—Only debts by persons residing or carrying on business in Ontario are subject to garnishee proceedings under sec. 190 of the Division Courts

Act, R.S.O. 1897 ch. 60, and the acceptance of service of a summons on behalf of a garnishee residing out of the Province by a solicitor in the Province and his appearance at the hearing and raising no objection, does not confer jurisdiction on the Division Court.

In re McCabe v. Middleton (1895), 27 O.R. 170, distinguish-ed.]—*Wilson v. Postle*, 203.

Cause of Action—Ascertainment of Signature of Defendant—Foreign Judgment.]—See PROHIBITION, 1.

School Teachers—School Board—Action for Salary—Jurisdiction.]—See PUBLIC SCHOOL, 1.

Judgment Debtor.]—*Order for Committal.*]—See PROHIBITION, 3.

DIVISIONAL COURT.

Proper Forum.]—See COURT.

DRAINAGE.

1. *Artificial Obstruction—Failure of Scheme—New Report without Examination.*]—A dam in a stream in the defendant township had the effect of penning back the water in and of preventing logs and other obstructions from making their way down the portion of the stream in the plaintiff township. The plaintiff township initiated a scheme under the drainage clauses of the Consolidated Municipal Act, 1883, for the

removal of the dam and other obstructions, and an engineer made the necessary examination and report in due form, but this scheme was set aside as unauthorized by the Act. After the amendment in 1886 of the drainage clauses by the addition of sub-secs. 18, 19 and 20 to sec. 570 the plaintiff township again initiated the scheme and referred it to the same engineer, who, without any further examination, rewrote his report and adopted his previous estimates and assessments. Notice was served in due course upon the defendant township and there was no appeal, and the plaintiff township did the work and brought this action for payment of the proportion of the cost assessed against the defendant township:—

Held, that the scheme was authorized by the amending sections, but, *per* OSLER and LISTER, J.J.A., that the report of the engineer was invalid and the scheme not binding. ARMOUR, C.J.O., and MOSS, J.A., taking the contrary view.

In the result the judgment of STREET, J., in favour of the defendants, was affirmed. *Township of Elizabethtown v. Township of Augusta*, 4.

2. *Artificial Drain—Repairs—Outlet.*]—Section 75 of the Drainage Act, R.S.O. 1897, ch. 226, applies only to drains artificially constructed and does not apply to the repair or improvement of a natural water-course.

Sutherland-Innes Company. v. Romney (1900), 30 S.C.R. 495, considered and followed.

Observations upon the private Act, 1 Edw. VII., ch. 72 (O.), validating the by-laws in question in that case.

Where part of a drainage work to which the provisions of sec. 75 apply is out of repair, it is not necessary before initiating proceedings for the improvement of the drain under that section for the initiating township to repair the portion of the existing drain which it is bound to repair. *MACLENNAN, J.A.*, dissenting.

Both classes of work may be provided for in the same by-law, the engineer in that case estimating and assessing separately the cost of each class.

Judgment of the Drainage Referee varied. *In re Township of Rochester v. Township of Mersea* (No. 2), 435.

Drainage Referee—Appeal to Court of Appeal.]—See COSTS, 1.

DOMICIL.

Origin—Abandonment—Husband and Wife—Alimony—Writ of Summons—Service out of Jurisdiction—Con. Rule 162 (c).

Held, affirming the decision of Ferguson, J., 1 O.L.R. 629, that the defendant had acquired a domicile of choice in Ontario, and had not abandoned that domicile; and therefore, the writ of summons in an action for alimony could properly be served

upon him out of Ontario, the case coming within Rule 162 (c). *Bonbright v. Bonbright*, 249.

ELECTIONS.

Municipal — Controverted Election.]—See MUNICIPAL ELECTIONS.

EMPLOYERS' LIABILITY.

See MASTER AND SERVANT, 2, 4.

EQUITABLE LIEN.

Charge on Land—Beneficial Ownership—Parol Trust—Prior Lien—Voluntary Conveyances.]—The defendant who had been for some years in possession of a farm purchased by his father with the intention of giving it to him, and who had in fact devised it to him, purchased a machine from the manufacturers giving his notes therefor, and at the same time executed a document which was duly registered, and in which it was stated that the land had been so "willed" to him that he had a good title thereto, and would not further incumber it, and he thereby charged it with the payment of the notes. The father subsequently conveyed the land to the defendant, but upon the condition of his executing a mortgage, which he did to certain persons who had advanced moneys to him. The defendant, on the ground that the land had been conveyed to him on an alleged trust for his

family, conveyed it to his wife, the consideration being \$1 and love and affection, and the wife, for the like consideration, conveyed it to an infant son:—

Held, that the charge in favour of the manufacturers was enforceable against the defendant and those claiming under him, by the plaintiff, the assignee of the manufacturers, but was subject to the mortgage; and the evidence displacing any trust in favour of the defendant's family, the conveyances by the defendant and his wife must be treated as merely voluntary and subject to the plaintiff's charge. *Abell v. Middleton*, 209.

ESTATE.

Tenants in Common—Joint Tenants—Title by Prescription—Statute of Limitations—R.S.O. 1897, ch. 119, sec. 11.]—Where of five tenants in common of a farm, three acquired a title against the other two by virtue of the Statute of Limitations:—

Held, that the title acquired by the three tenants was a joint tenancy, and that they were thus tenants in common of their original three-fifths and joint tenants of the two-fifths. *In re Livingstone Estate*, 1.

EVIDENCE.

Workmen's Compensation Act—Statement of Deceased—Cause of Injury.]—See MASTER AND SERVANT, 2.

EXECUTORS AND ADMINISTRATORS.

1. *Goods Exempt from Execution—Right of Widow to—Effect of Provision for Wife in Will—Devolution of Estates Act—Gift of Property Belonging to Wife—Election—Insurance Moneys—Charge on—Payment by Devises pro rata.*]—Goods of a deceased husband exempt from seizure under the Execution Act, R.S.O. 1897, ch. 77, are not, except as to funeral and testamentary expenses, assets in the hands of his executors for the payment of debts, the effect of sec. 4 of that Act being to give his wife a parliamentary title thereto.

The fact of the wife being residuary devisee, under the husband's will, does not put her to her election as to taking such goods either under her statutory title or under the gift of the residue, unless the testator clearly assumes to deal with them as part of the residue, and the fact that under the terms of the will the provision made for her should be in lieu of dower does not create a presumption that he is dealing with the goods.

Section 4 of the Devolution of Estates Act, R.S.O. 1897, ch. 127, which makes all the personal property of a testator in the hands of his personal representatives subject to the payment of his debts, must be read as being subject to sec. 4 of the Execution Act.

A piano belonging to the wife,

who was the residuary devisee of the real and personal estate, was dealt with by the husband under his will, as part of his estate, by giving it to his son:—

Held, that the wife must elect either to allow the son to retain it, or to take it herself, making good to the son the value thereof out of the provision made for her in the will.

A policy of insurance was by the husband's will made payable to and for the benefit of his wife and son, and he thereby apportioned the proceeds between them. The policy was charged with the payment of a loan procured by the testator from the company:—

Held, that the amount of the loan was payable by the wife and son *pro rata* out of their respective shares of such moneys, the gifts to them being specific. *Re Tatham*, 343.

2. *Accounts—Surrogate Court—Estoppel.*]—The surrogate courts of Ontario are invested with the authority and jurisdiction over executors and administrators, and the rendering by them of inventories and accounts, conferred in England on the Ordinary under 21 Hen. VIII., ch. 5, the effect of Rule 19 of the surrogate court rules of 1892, as limited by sec. 73 of the Surrogate Courts Act, R.S.O. 1897, ch. 59, being to bring the practice back to that in force under the ancient statute.

It is not only the duty of an executor or administrator to file

an inventory and render an account when duly called upon to do so, but it is his privilege to do so voluntarily in any case in which he is liable to be called upon, and this privilege, in case of his death, extends to his personal representative, though not at the same time the representative of the original testator, and even though there is a surviving representative of the original testator.

Where, therefore, the executors of an executor brought into the proper surrogate court an account of the dealings of their testator with the assets of the estate of the original testator, treating in the account as cash received by the accounting executor the amount of a certain promissory note, and the account was audited and approved after due notice to the surviving executor of the original testator, it was held in an issue in the High Court between the surviving executor of the original testator and the executors of the deceased executor, upon pleadings so framed as to raise not only the question of the property in this note but also the question of the right to the proceeds thereof, that the audit and approval of the account were a binding adjudication as against the surviving executor, and that the proceeds of the note were payable to the estate of his deceased executor.

Judgment of Falconbridge, C.J., affirmed. *Cunnington v. Cunningham*, 511.

3. *Fatal Accidents Act — Death of Beneficiary—Survival of Action.*]—Upon the death before judgment of the sole beneficiary on whose behalf an administrator has brought an action under the Fatal Accidents Act, R.S.O. 1897, ch. 166, the action comes to an end. It cannot be continued for the benefit of the beneficiary's estate, nor can a new action be brought by the beneficiary's personal representative.

Judgment of Ferguson, J., 32 O.R. 234, reversed. *McHugh v. Grand Trunk R. W. Co.*, 600.

4. *Direction to Set Aside Certain Sum and Pay Income to Life Tenant — Productive and Unproductive Assets—Rights of Life Tenant.*]—A testator directed his executors to set apart and invest \$50,000 out of his estate, and pay the income semi-annually to his wife during her life, with power to appoint, and in default of appointment, over. He then gave the residue equally among his children. The estate consisted of income producing securities to the value of \$30,000, and a large amount of unproductive land:—

Held, that the executors were bound to reserve sufficient productive assets to secure an income adequate to the payment of taxes and other necessary expenses, and the widow was entitled, from the expiration of a year from the testator's death, to a first charge on the unproductive assets for the income so

taken, and to the balance of the income from the productive assets, and to have the principal producing such balance, set apart towards the fund of \$50,000, ultimately to be made up as the lands were sold, according to the following rules: As lands or other assets were sold the proceeds should be apportioned between capital and income by ascertaining the sum which, put out at interest at the expiration of a year from the testator's death, and accumulated at compound interest with half-yearly rests, would, with accumulations of interest, have produced at the day of receipt, the amount actually received from the sale of the lands or other assets; the sum so ascertained to be treated as capital, and added to the sum theretofore set apart towards the \$50,000; and the residue to be treated as income and paid over to the widow.

In re Earl of Chesterfield's Trusts (1883), 24 Ch. D. 643; and *In re Morley, Morley v. Haig*, [1895] 2 Ch. 738, applied. *In re Cameron*, 756.

Probate Wrongfully Obtained — Trustees for Persons Entitled on an Intestacy—Liability of Trustees.]—See WILL, 3.

Purchase by Executors — Additional Shares.]—See WILL, 5.

Right of Retainer—Putting Assets out of Possession and Control.]—See HUSBAND AND WIFE.

FIRE INSURANCE.

Insurance by Mortgagor — Loss Payable to Mortgagee — Release of Equity Redemption — Cessation of Mortgagor's Interest — Right of Mortgagee to Claim Insurance Moneys.]—A mortgagor who had made a mortgage, under the Short Forms Act, containing a covenant to insure the mortgaged premises against fire, effected an insurance thereon with defendants, the loss, by the policy, being payable to the plaintiff, the mortgagee, as his interest might appear under the mortgage. Subsequently the mortgagor conveyed his equity of redemption to the mortgagee without the consent of the insurance company having been obtained therefor. The premises having been afterwards destroyed by fire:—

Held, that the plaintiff was not entitled to the insurance moneys, for (1) the fact of the conveyance made by the mortgagor to the plaintiff, whereby he ceased to have any interest at the time of the fire, was a good answer to the claim; and (2), such conveyance constituted a breach of the fourth statutory condition, which provides against the insured premises being assigned without the insurance company's consent. *Pinhey v. Mercantile Fire Ins. Co.*, 296.

FIXTURES.

Mortgage—Plant.]—A mortgage of an electro-plating fac-

tory "together with all the plant and machinery at present in use in the factory" does not cover patterns used in the business, sent from time to time from the factory to foundries to have mouldings made, and not in the factory at the time of the making of the mortgage.

Judgment of Ferguson, J., 1 O.L.R. 229, reversed. *McCosh v. Barton*, 77.

Electric Street Railway — Mortgage—Rolling Stock—Poles — Wires.]—See STREET RAILWAY, 2.

FOREIGN JUDGMENT.

Action on—Division Court — Jurisdiction.]—See PROHIBITION, 1.

FORTUNE TELLING.

See CRIMINAL LAW, 1.

GIFT.

Undue Influence — Parent and Child — Principal and Agent.]—In the case of a gift from a principal to an agent attacked on the ground of undue influence something more must be shewn than the mere fact that the donee was the agent of the donor, and in the absence of proof of more, the donee is not called upon to shew independent advice.

The fact in this case of the donee being the son of the donor was held not to alter the principle applicable, the son being, as was

found on the evidence, the agent and business manager of the father, and the gift in question, which was made to the son as trustee for his children in consideration of services rendered by the son, was upheld.

Judgment of a Divisional Court, 31 O.R. 414, reversed. *Trust and Guarantee Company v. Hart*, 251.

GUARDIAN.

Passing Accounts.]—See SURROGATE COURT.

HIGH COURT OF JUSTICE.

Jurisdiction—Foreign Land—Trusts.]—An action will not lie in this Province for a declaration that, under a transaction entered into outside Ontario, land situate beyond the limits of the Province is held by the defendants as mortgagees and for redemption, even though the defendants reside in the Province at the time of the bringing of the action against them, and took from the original grantee with notice of the plaintiff's rights.

Judgment of Meredith, C.J., 30 O.R. 650, affirmed. MacLennan, J.A., dissenting. *Gunn v. Harper*, 611.

HIGHWAY.

Dedication of—Reservation of Right to Charge for Access.]—See INDEMNITY.

HUSBAND AND WIFE

Statute of Limitations—Executors and Administrators—Right of Retainer—Devolution of Estates Act.]—In 1876 the plaintiff advanced to her husband the purchase money of certain land subject to a mortgage and which was accordingly conveyed to him. The existing mortgage was paid off and a fresh mortgage was subsequently executed, the plaintiff joining to bar her dower in it. On his death in 1893 he devised the land to the plaintiff and one of his sons in equal shares. In 1901 the plaintiff obtained an order for partition or sale of so much of the land as had not been sold, and a sale being made, she filed a claim upon the proceeds as a creditor for the amount originally advanced by her to purchase the lands. The plaintiff alleged that the land was conveyed to her husband to enable him to vote:—

Held, that assuming the purchase money was entrusted by the plaintiff to her husband to invest for her in the purchase of land, that express trust was performed and was at an end when the land was conveyed to him:—

Held, also, that even assuming the money had been advanced by her by way of loan, her claim was barred by the Statute of Limitations, for there is no reason why the Statute of Limitations should not be applied to such a claim by a wife against her husband in the same

way as if she were not his wife:—

Held, also, that though she was her husband's executrix, she had no longer any right of retainer in respect to her alleged debt, as by her own acts, by registering no caution within twelve months and then treating the property as vested in the defendants, the heirs of her co-devisee, she had put the assets out of her own possession and control.

Under all the circumstances of the case, and in view of the conduct of the plaintiff, held, however, that the transaction was not a loan but a gift by the plaintiff to her husband. *In re Starr, Starr v. Starr*, 762.

Goods Exempt from Execution—Right of Widow to—Bequest by Husband of Wife's Property. See EXECUTORS AND ADMINISTRATORS, 1.

INDEMNITY.

Bond—Future Payments.]—The Court held that College Street in the City of Toronto was, up to the year 1889, a private road to which adjoining owners acquired no right of access; that the reservation upon its dedication in that year by the University of Toronto to the City of Toronto of the right of the University to compel adjoining owners to pay for the right of access was valid; that a covenant by a vendor of land adjoining the street in favour of the purchaser thereof to in-

demnify him "against the payment of any money, and against all loss, costs or damages he may be obliged to pay to secure access" was therefore enforceable; and that the covenantee could recover not only the amount of payments actually made but also the amount of payments to be made by him in the future under an agreement by which he agreed to pay for the right of access a sum in instalments.

Judgment of MacMahon, J., 1 O.L.R. 382, affirmed. *Palmer v. Jones*, 632.

INSURANCE.

1. *Accident Insurance—Change in Occupation—Exposure to Danger.*]—An accident insurance policy in favour of a railway servant, described as a baggageman, and employed as such at a small railway station, provided that if the insured were injured "in any occupation or exposure" classed by the company as more hazardous than that stated therein, the amount recoverable should be reduced in a certain proportion, and also that injuries resulting from "voluntary exposure to unnecessary danger" were not covered. The insured while coupling cars received injuries which resulted in his death. It was shewn that at a small station like that in question a baggageman would not infrequently couple cars, and that the insured had often done this work

although not strictly within the scope of his employment, this work being as a rule done by brakesmen, and the occupation of brakesman was classed by the defendants as more hazardous than that of baggageman:—

Held, that hazardous “occupation or exposure” referred to in the policy was something of a permanent nature, and that the doing of isolated acts of a more hazardous nature did not change the insured’s class or entitle the insurers to reduce the amount recoverable.

Held, also, *per* ARMOUR, C.J.O., that “voluntary exposure to unnecessary danger” means voluntary exposure to a danger which it is unnecessary for anyone to expose himself to under the circumstances, and *per* MACLENNAN, J.A., that as the act of coupling was a necessary one, and as the insured might reasonably have thought that it was his duty to do the act, there was not a voluntary exposure to unnecessary danger. But *per* OSLER, and MOSS, J.J.A., that there was, the act being a voluntary one and its danger being apparent.

In the result the judgment of Falconbridge, C.J., 32 O.R. 248, in favour of the insured’s representatives was affirmed. *McNevin v. Canadian Railway Accident Insurance Co.*, 521.

2. *Life Insurance* — *Wager policy* — *Cancellation* — *Repayment of Premiums*] — The defendant, an elderly man, purchased from the plaintiff com-

pany an annuity upon his life, and, pursuant to a pre-existing arrangement between them, an insurance agent, who was a much younger man, insured his life with the plaintiff company for an amount the premiums upon which were equal to the amount of the annuity, and at once assigned the policy to the defendant who agreed to pay, and did for some years pay, the premium. The insurance agent got the benefit of the commissions on the annuity and the insurance and was not otherwise interested in the insurance:—

Held, that the insurance was void, as being in violation of 14 Geo. III, ch. 48, sec. 1, and that the plaintiffs, in an action brought after the death of the assured, were entitled to have the policy delivered up to be cancelled.

Judgment of Street, J., affirmed.

Held, also, however, that though the defendant could not have maintained an action to recover the premiums, the plaintiffs seeking equitable relief were bound to do equity and to repay the premiums with interest, the risk never having attached.

Judgment of Street, J., reversed. *North American Life Assurance Co. v. Brophy*, 559.

3. *Life—Unmatured Policy* — *Present Value of Reversion* — *Mode of Calculating* — *Statute* — *Amendment* — *Declaration as to Former Law.*] — The ascertain-

ment of the present value of the reversion in the sum assured by the policy at the decease of the life insured, as directed by the judgment in 1 O.L.R. 256, is a matter of simple calculation from the ordinary life insurance tables; the premium actually paid by the insured has nothing to do with the calculation.

The statute 1 Edw. VII. ch. 21 (O.), assented to on the 15th April, 1901, altering the manner of valuing unmatured policies, and enacting that the alterations declared the law of the Province as it existed on the 14th April, 1892, did not affect the rights of the claimants under their policies, because those rights had been declared by the judgment in 1 O.L.R. 256 before the Act was passed, and judgments are not reopened even by such legislation. *Re Merchants' Life Association of Toronto, Vernon Claims*, 682.

See LIFE INSURANCE

Life—Application for—Issue of Policy—Date of Policy—Completed Contract—Due Dates of Premium. See LIFE INSURANCE.

Life—Materiality—Misstatement of Age. See BENEVOLENT SOCIETY.

Fire—Mortgaged Premises—Cessation of Mortgagor's Interest Release of Equity of Redemption. See FIRE INSURANCE.

INTOXICATING LIQUORS.

See LIQUOR LICENSE ACT.

JURISDICTION.

Foreign Defendants. See MORTGAGE.

JURY.

Libel and Slander—Non-suit after Finding by Jury in Plaintiff's Favor. See DEFAMATION, 1.

JUSTICE OF THE PEACE.

Territorial Jurisdiction—Act for Protection of Sheep—Offence Against—Locality of—Owning Vicious Dogs—Order for Destruction—Order for Damages—Information—Quashing Orders—Costs.]— Upon a motion to quash an order of a justice of the peace for the County of Waterloo, under secs. 11-13 of R. S. O. 1897, ch. 271, an Act for the Protection of Sheep and to impose a Tax on Dogs, finding that the defendant, at the town of Waterloo, did unlawfully have in his possession two dogs, which dogs worried and injured two sheep, the property of the complainant, at the township of Wellesley, and ordering the defendant to kill the dogs:—

Held, that the offence under sec. 11 was the having in possession a dog which, wherever the act was done, had worried, injured, or destroyed sheep, and therefore the offence was committed at the town of Waterloo, where the defendant lived, and a magistrate for the county had no jurisdiction, there being a police magistrate for the town,

and it not appearing, that the convicting magistrate was acting for or at the request of such police magistrate.

Upon the same information the same magistrate also made an order, under sec. 15 of the Act, for payment by the defendant to the complainant of \$10 (said to be the value of the sheep) and costs:—

Held, that the proceeding under sec. 15 is independent of one under secs. 11-13, and the magistrate had no power to award damages for the injury to the sheep without a separate complaint.

The first order was quashed without costs, because the question of the magistrate's jurisdiction was not raised before him, and the assuming jurisdiction was his mistake. The second order was quashed with costs to be paid by the complainant, because he insisted on going on with the claim for damages before the magistrate. *Rex v. Duering*, 593.

LIBEL AND SLANDER.

See DEFAMATION, 1, 2.

“*Blackmailing*”—*Innuendo*—*Jury*. See DEFAMATION, 1.

Indictment for Libel—*Fresh Libels*—*Good Behaviour*. See CRIMINAL LAW, 2.

LIFE ESTATE.

Reserved out of Equity of Redemption—*Payment of Mort-*

gage—*Assignment*. See MORTGAGE, 2.

LIFE INSURANCE.

Application for — Issue of Policy — Completed Contract — Antedating Policy — Policy Not to Take Effect Before First Payment of Premium — Due Dates of Premium.]—The initialling of an application for insurance by officers of an insurance company, though indicating acceptance of the risk, does not without communication of the fact to the applicant constitute any contract with him.

If a policy is afterwards prepared and the applicant informed that it is ready for him, this will constitute an acceptance of the original application; and such policy may be properly antedated to the date of the application.

A provision in the application and policy, that the insurance shall not be binding on the company, or the policy go into effect until payment of the first premium, will not postpone or affect the due dates at which the respective premiums will fall due, so as to make them different from those mentioned in the policy.

Per BOYD, C.—Acceptance of the policy by the applicant without objection after paying his first premium, and a subsequent payment of the second premium by him according to the terms of the policy, is cogent, and after his death conclusive evidence of his consent to the contract as

expressed in the policy. *Armstrong v. Provident Savings Life Assurance Society*, 771.

Charge on — Payment by devisees pro rata.]—See EXECUTORS AND ADMINISTRATORS, 1.

Wager Policy—Cancellation—Repayment of Premiums.]—See INSURANCE, 2.

LIMITATION OF ACTIONS.

1. *Disability—Annuity—Will—Charge on Land—Arrears—Lunatic.*]—By a will made in 1872 a testator, who died in the same year, devised land to two sons, "subject to the payment by my said two sons of the sum of \$200 per annum, for the benefit of my son Thomas Anson, which said sum, or annuity, or so much thereof as shall be reasonably necessary for the support and maintenance of my said son Thomas Anson, shall be paid yearly and every year, for and during the natural life of my said son Thomas, to the person or persons who may be his guardian or guardians." The son Thomas Anson was of age at the time of the testator's death but was of unsound mind, and he was declared a lunatic in 1898, and the plaintiffs were appointed committee of his person and estate. After the father's death the son lived with his mother, to whom from time to time till February, 1889, payments were made on account of the annuity:—

Held, that the annuity was

charged on the land; that it was, therefore, by virtue of sec. 2 (3) of the Limitations Act, R.S.O. 1897 ch. 133, rent within the meaning of that Act; that the payments to the mother, who was the guardian *de facto*, were good, and that the statute did not begin to run till the last of them was made: that apart from the question of disability the right of action would have been barred at the expiration of ten years from that time; but that by secs. 43 and 44 the time was extended for five years from the removal of disability, or for twenty years; and that, therefore, an action brought in February, 1900, was in time and that six years' arrears could be recovered.

Judgment of MacMahon, J., 31 O.R. 504, affirmed. *Trust and Guarantee Co. v. Trusts Corporation of Ontario*, 97.

2. *Grant to Uses—Deed of Appointment — Intervening Adverse Possession.*]—The purchaser of land in 1870 had it conveyed by the vendor to grantees named by him to hold to such uses as the purchaser should by deed or will appoint, and in default of, and until, appointment to the use of the grantees. The purchaser put his mother in possession of the land, and she remained in possession till her death in 1878, her two daughters, the defendants, living with her, and they after her death continued in possession down to the time of the bringing of this action in

1897, no rent having been paid, nor any acknowledgment of title given. In 1892 the purchaser, in alleged exercise of the power, executed a deed of appointment in favour of his solicitor, who, on the following day, conveyed to him in fee simple. He died in 1894, having devised the land to the plaintiffs:—

Held, that the grantees to uses took an estate in fee simple which was barred before the execution of the deed of appointment, and that deed did not give a new starting point to the statute, the estate appointed not being within the meaning of the statute, a future estate coming into existence at the time of the exercise of the power.

Judgment of a Divisional Court, 30 O.R. 504, reversed, BOYD, C., and STREET, J., dissenting. *Thuresson v. Thuresson*, 637.

LINE FENCES.

Agreement to Keep in Repair — Damages — By-law — Liability.—The plaintiff and defendant, adjoining land owners, made an arbitrary division of the line fence between their lots, which was less than five feet in height, which they were to build and keep in repair. By reason of the defendant allowing his portion to get into disrepair, his cattle and sheep got on to the plaintiff's land and damaged it. The defendant also allowed his cattle to escape and run at large on the highway, from whence, by breaking down the

plaintiff's fences, they got on to the plaintiff's land, and further damaged it. A township by-law provided that no fence should be less than five feet high, etc., and prohibited the running at large of all breachy cattle, *i.e.*, cattle known to throw down or leap over any fence four feet high, and provided for impounding them, etc.:—

Held, that the defendant was liable for the damages sustained by the plaintiff; and that such liability was not displaced by the by-law. *Barber v. Cleave*, 213.

LIQUOR LICENSE ACT.

Transfer of License—Premises to be Made "Suitable"—Powers of License Commissioners—Ratepayers' Petitions—Illegal Conduct—Injunction—Costs.]—License commissioners appointed under the Ontario Liquor License Act have no power to say to an applicant for a transfer of a license that, if he will put certain premises into a suitable state for compliance with the law in the future, they will transfer a license to such premises; they are entitled to act under the statute only with regard to the existing state of facts, not to make promises as to the future, in such cases.

O'C., having no interest in the premises proposed to be licensed, and having no valid license at all, presented a petition to the commissioners for the transfer to these premises of a license

standing in his name for other premises in which he had no longer any real interest. He supported this by the statutory ratepayers' petition, which stated that the new premises were suitable for a tavern, whereas they admittedly did not possess the required accommodation, and that he was a proper person to become licensee of them. The commissioners heard petitions and counter-petitions upon the matter, and decided that they would allow the transfer of O'C.'s license to the new premises when they should be made suitable; but before that time arrived O'C., whose fitness for the transfer was one of the subjects of the petition, had ceased to have any interest in the matter, and was allowed to make over his right to K., who in this way escaped the necessity of obtaining the certificate of the ratepayers as to his fitness:—

Held, that this was illegal, and if the plaintiff had asked promptly for an injunction to prevent O'C., when he had no valid license and no interest in the new premises, from obtaining rights by asserting that he had, he might possibly have obtained some relief; but at the trial it was too late to interfere, for K. had obtained rights which could not be interfered with in his absence, and the license commissioners whose conduct was in question had ceased to hold office.

Held, also, that an offer made by the defendants to submit the

question of the costs of the action to be disposed of in Chambers should have been accepted by the plaintiff, and, as it was not, the plaintiff was not entitled to costs against O'C.; and, as the unauthorized action of the license commissioners had caused the trouble, they should not have costs against the plaintiff. *East v. O'Connor*, 355.

LUNATIC.

Husband and Wife — Removal by Wife's Relatives.]—*See* ALIMONY, 1.

MANDAMUS.

Malicious Prosecution — Record of Acquittal — Clerk of the Peace — Quarter Sessions — Fiat of Attorney-General.]—The books, indictments and records of the court of quarter sessions, which are in the hands of the clerk of the peace, are public documents which everyone who is interested in has a right to see; and a defendant who has been tried and acquitted at the sessions is entitled to a copy of the record of acquittal, and it is not necessary to obtain the fiat of the Attorney-General therefor.

Regina v. Ivy (1874), 24 C.P. 78, and *Hewitt v. Cane* (1894), 26 O.R. 133, distinguished. *Rex v. Scully*, 315.

MASTER AND SERVANT.

1. *Defective Plant — Negligence.*]—As a fisherman employ-

ed by the defendants was dragging by its wooden handle, according to the usual practice adopted on the defendants' fishing tug, a heavy box of fish along the deck, the handle, which was made of a poor quality of wood, broke, and the man fell overboard and was drowned:—

Held, that the defendants were bound even at common law to exercise due care to furnish to their men material and plant in a sound and proper condition, and that they were liable in damages.

Judgment of Rose, J., affirmed. *Sim v. Dominion Fish Company*, 69.

2. *Workmen's Compensation Act—Notice of Injury—Excuse for Want of—Evidence—Statement of Deceased—Negligence—Cause of Injury—Jury.*—The knowledge of the defendants of the injury and the cause of it, at the time it occurs, is (in case of death) a reasonable excuse for the want of the notice of injury required by sec. 9 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, where there is no evidence that they were in any way prejudiced in their defence by the want of it.

Where the deceased received the injuries from which he died by being run over by a train of cars, a statement made by him immediately after he was run over, in answer to a question as to how it happened, "I slipped

and it hit me," was held admissible in evidence.

Thompson v. Trevanion (1693), Skin. 402, *Aveson v. Kinnaird* (1805), 6 East 188, 193, and *Rex v. Foster* (1834), 6 C. & P. 325, followed.

Upon that evidence and evidence of the slippery condition, by reason of snow and ice, of the place where the deceased slipped, a question should have been submitted to the jury whether he slipped by reason of such condition and whether such condition was due to the negligence of the defendants. *Armstrong v. Canada Atlantic R. W. Co.*, 219.

3. *Dual Employment—Profits.*—While a servant cannot in the course of his employment, and in connection with the services he has agreed to render to his master, earn for his own benefit any remuneration or profit, he can do so in connection with any collateral or independent work or business, not carried on in competition with that of the master.

The manager of a cold storage company was held entitled therefore to a commission on the sale to another company of a cold storage plant effected by the makers thereof through his efforts, the cold storage company not being themselves makers of or dealers in cold storage plant.

Judgment of Boyd, C., 32 O.R. 191, reversed. *Jones v. Linde British Refrigerator Co.*, 428.

4. *Negligence—Factories Act — Breach — Damages — New Trial.*—Employing a girl under eighteen years of age to work between the fixed and traversing parts of a self-acting machine while it is in motion, in breach of the provisions of section 14 of the Ontario Factories Act, R.S.O. 1897, ch. 256, is in itself sufficient to render the master *prima facie* liable in damages for an accident which happens in the course of such employment, and negligence on his part directly conducting to the accident need not be shewn.

Roberts v. Taylor (1899), 31 O.R. 10, overruled.

Judgment of Street, J., 1 O.L.R. 18, reversed.

The Court being of opinion, however, that the damages awarded by the jury were excessive, directed that there should be a new trial unless the damages were reduced. *Fahey v. Jephcott*, 449.

Opening in Street—Accident to Foot Passenger—Filling Cellar.—See WAY.

School Teacher—Termination of Contract With—Action for Salary.—See PUBLIC SCHOOL, 1.

MASTER'S OFFICE.

Report—Confirmation — Notice of Filing.—See PRACTICE, 2.

MEDICINE AND SURGERY.

Malpractice — Questions for Jury.—In an action against a

surgeon for malpractice, the plaintiff has the right to a decision by a jury of a fact in controversy—not where that decision involves the consideration of difficult questions in the region of scientific inquiry, but where the fact to be found is as to what actually took place in the history of the plaintiff's malady and the defendant's treatment, *e.g.*, where there is a conflict of testimony as to what the surgeon did or did not do in the process of reducing or attempting to reduce a fracture.

Jackson v. Hyde (1869), 28 U.C.R. 294, explained. *McNulty v. Morris*, 656.

MISTAKE OF TITLE.

Improvements Under—Construction of Will—Life Estate or Estate Tail.—See WILL, 6.

Improvements Under—Contract of Sale—Defective Title.—See WILL, 9.

MORTGAGE.

1. *Pretended Sale under Power — Fraud — Purchasers for Value without Notice — Knowledge of Agent—Interest to Conceal—Redemption—Compensation — Costs — Jurisdiction—Foreign Defendants.*—R. purchased a mortgage of land from the mortgagee, and caused it to be assigned to his nominee, who, by R.'s direction, took proceedings under the power of sale and sold and conveyed to H., another nominee

of R., who then induced three other persons to join him in a purchase of the land, at a large profit, concealing from them the fact that he was himself the real vendor. These co-purchasers paid three-fourths of the price at which the land was sold to them, and the land was conveyed to them and R. by H., and the conveyance registered, they not suspecting that the transaction was otherwise than as represented by R., and as on the face of the document it appeared to be.

In an action by the mortgagor to set aside the conveyances and for redemption it was conceded that the sale to H. under the power was inoperative:—

Held, that the three associates of R. were purchasers for value without notice, and, having registered their conveyance, were not affected by the equity of the mortgagor to set aside the conveyance to H., nor by the knowledge which R. had of the mortgagor's rights, nor by the knowledge which their solicitor had, the same solicitor having acted for them who acted for R. in the proceedings taken under the power of sale; for R. had been guilty of a fraud upon the mortgagor, and he was committing a fraud upon his associates in the purchase by representing that a stranger was the vendor and that the price was four times as much as he had himself paid; and therefore notice to his associates could not be imputed of that which was

within the knowledge of R. and the solicitor, and which it was their interest to conceal.

Cameron v. Hutchison (1869), 16 Gr. 526, applied.

Held, also, that R.'s associates were entitled to costs against R.

Faulds v. Harper (1886), 11 S.C.R. 639, followed.

Held, also, that, as an undivided one-fourth of the mortgaged premises remained vested in R., the plaintiffs were, as to him, entitled to redeem; and if on redemption he should not be in a position to re-convey the other undivided three-quarters, he must make compensation to them for the value of it.

Held, lastly, that there was jurisdiction in the Court, notwithstanding that R. and his two nominees were foreigners, not domiciled nor resident in Ontario, to award judgment against them, not only for redemption, but also for costs and damages or compensation, the compensation being incidental to the redemption, R. having by appearing attorned to the jurisdiction, and the case moreover falling within clauses (b), (d), (e), and (f) of Rule 162 (1), relating to service of writs out of the jurisdiction. *Smith v. Hunt*, 134.

2. *Conveyance of Land Subject to Mortgage Reserving a Life Estate—Right to Assignment under R.S.O. 1897, ch. 121, sec. 2, sub-secs. 1 and 2.*—The owner of land mortgaged it and then, reserving a life estate

to himself, conveyed it in fee subject to the mortgage :—

Held, that the grantee was not entitled on payment of the mortgage to an assignment of it to himself or his nominee under R.S.O. 1897, ch. 121, sec. 2, subsecs. 1 and 2; the mortgagee having notice of the equitable right of the grantor to have his life estate relieved of the burden by payment of the mortgage.

Semble, the grantee was entitled to have the mortgage assigned in such a way that it would remain an encumbrance on the remainder in fee vested in him.

Judgment of Falconbridge, C.J., affirmed. *Leitch v. Leitch*, 233.

3. *Foreclosure—Opening up—Subsequent Incumbrancer.*]

Mortgagees obtained the usual judgment against the mortgagor and his wife for redemption or foreclosure on the 5th of April, 1900. The Master added as defendants a subsequent mortgagee and creditors of the mortgagor having a *fi. fa.* lands in the hands of the sheriff, and by his report, dated the 16th May, 1900, certified that the execution creditors had not proved any claim, and appointed the 17th November, 1900, for payment by the subsequent mortgagee. Payment not having been made, a final order of foreclosure as to the added defendants was issued on the 21st November, 1900. The Master thereupon made a subsequent report appointing the

29th December, 1900, as the day for payment by the original defendants; and payment not having been made by them, a final order of foreclosure was issued against them on the 29th January, 1901. On the 3rd April, 1901, the execution creditors served a notice of motion to open the foreclosure. On the same day the mortgagees had written to the mortgagor offering to give them, as of grace, a part of any surplus over their claim which they should realize by a sale of the mortgaged premises, upon the mortgagor agreeing not to move to open the foreclosure :—

Held, that the execution creditors, having moved with reasonable promptness, and being in a position to give the mortgagees immediate payment, were, under the circumstances detailed in the evidence, entitled to have the foreclosure set aside and to be let in to redeem upon the usual terms.

Thornhill v. Manning (1851), 1 Sim. N.S. 451, followed. *Scottish American Investment Co. v. Brewer*, 369.

4. *Covenant—Release—Sale of Equity of Redemption.*]

When land subject to mortgage is sold by the mortgagor and the purchaser assumes and covenants to pay the mortgage the mortgagor does not become a surety to the mortgagee in the technical sense, and the doctrines as to the discharge of sureties do not apply to him to their full extent. The mortgagor is

liable therefor upon his covenant notwithstanding a previous extension of time granted by the mortgagee to the purchaser, if when the liability is enforced the right of the mortgagor to redeem is not affected.

Judgment of a Divisional Court, 32 O.R. 175, affirmed, OSLER and MACLENNAN, JJ.A., dissenting. *Forster v. Ivey*, 480.

5. *Redemption—Acceleration—Assignment Pendente Lite—Parties*—When a mortgagee, upon default in payment of an instalment of interest, brings a foreclosure action and claims payment of the full amount secured by the mortgage any party to the action by original writ or added in the Master's office or by subsequent order, is entitled to hold him to his election and to pay his claim. But this right must be taken advantage of in the foreclosure action and does not enure to the benefit of a person not a party to that action who ignores the foreclosure proceedings and brings a redemption action after making an independent tender to the mortgagee.

A person who, after the institution of the foreclosure action, acquires an interest in or claim against the mortgaged premises, may, on his application, be added as a party.

Judgment of Rose, J., reversed. *Gibson v. McLean*, 500.

Equitable Lien—Charge of Land—Parol Trust. See EQUITABLE LIEN.

Fixtures—Plant. See FIXTURES.

Foreclosure—Trustee with Lien—Sale by Court. See TRUSTEE.

Joint Stock Company—After acquired Property—Fixtures. See STREET RAILWAY, 2.

MUNICIPAL ELECTIONS.

Controverted Election—Allowance of Recognizance—Defective Nominations—Powers of Returning Officer—Omission to State Full Name—R.S.O. 1897 ch. 223, sec. 128 (1), 220 (2).—When in a controverted municipal election a recognizance has been duly entered into with sureties and affidavit of justification as required by R.S.O. 1897 ch. 223, sec. 220 (2), the security is completed; but the Judge may postpone endorsing his allowance of it until objection raised.

Such interlocutory procedure is matter of discretion, and not subject of appeal

The provisions of R. S. O. 1897 ch. 223, sec. 128, (1) that every nomination is to state the full name, etc., of the candidate are directory, not imperative; and the presiding officer cannot after the close of the meeting for nominations reject those made on account of non-compliance with such requirements.

Semble, if objection is taken at the time, and the nominations are not amended, the presiding officer should then

and there reject them. *See Rex ex rel. Walton v. Freeborn*, 165

See DRAINAGE, 1.

Arbitration — Purchase of Electric Light Plant — Appointment of Sole Arbitrator. See ARBITRATION AND AWARD, 3.

Drainage — Repairs — Extension — By-law. See DRAINAGE, 2.

Highway — Removal of Snow. See STREET RAILWAY, 1.

Opening in Street — Nonfeasance — Liability. See WAY.

Right of Railways to cross Streets — Compensation. See RAILWAYS, 1.

Running at Large — Horse — Highway — Negligence. See NEGLIGENCE, 3.

School Board — Annual Estimates — Revision — Powers of Municipal Council. See PUBLIC SCHOOLS, 2.

NEGLIGENCE.

1. *Street Railway.*] — The motorman of an electric car is not necessarily guilty of negligence because he does not at once stop the car at the first notice that a horse is being frightened either at the car or at something else. All that can be expected is that the motorman shall proceed carefully, and it is in each case a question whether that has been done.

Upon the facts of this case the majority of the Court held that there was no evidence to

justify a finding of negligence and set aside a judgment in the plaintiff's favour.

Judgment of Falconbridge, C.J., reversed. *Robinson v. Toronto R. W. Co.*, 18.

2. *Contributory Negligence — Jury — Trial — Form of Questions.*] — When contributory negligence is set up in an action to recover damages for negligence, which is being tried before a jury, the plaintiff is entitled to a clear and distinct finding upon the point.

In an action against a street railway company to recover damages, the jury, after finding in answer to questions that the defendants were guilty of negligence, in running at too high a rate of speed, not properly sounding the gong, and not having the car under proper control, and that the plaintiff's injury was caused by this negligence, said in answer to further questions, that the plaintiff was guilty of contributory negligence in not using more caution in crossing the railway tracks:—

Held, that this answer was ambiguous and unsatisfactory, and, in view of the previous distinct answers, not fairly to be treated as a finding of contributory negligence.

Per OSLER, J.A. Instead of putting in such cases the question, "Was the plaintiff guilty of contributory negligence?" involving, as it does, both the fact and the law, it would be better to ask, "Could the plaintiff by the exercise of reasonable

care have avoided the injury?" and to provide for the case of an affirmative answer by the further question, "If so, in what respect do you think the plaintiff omitted to take reasonable care?"

Judgment of Meredith, C.J., reversed. *Brown v. London Street R. W. Co.*, 53.

3. *Highway—Horse.*—The defendant's horse strayed from his field to the highway, the fence being defective, and, being frightened by a boy, ran upon the sidewalk and knocked down and injured the plaintiff. A municipal by-law made it unlawful for any person to allow horses to run at large:—

Held, that the horse was unlawfully on the highway and that the defendant was liable in damages for the injury suffered by the plaintiff, the injury being the natural result of, and properly attributable to his negligence.

Judgment of a Divisional Court, 1 O.L.R. 412, affirmed. *Patterson v. Fanning*, 462.

Cause of Injury—Statement of Deceased—Questions for Jury.—See MASTER AND SERVANT, 2.

Defective Plant.—See MASTER AND SERVANT, 1.

NUISANCE.

Electrical Light Company—Vibration—Expropriation of Lands.—See COMPANY, 2.

Railways—Carriage of Animals—Proper Exercise of Powers.—See RAILWAYS, 2.

PARTICULARS.

Defence — "Not Guilty by Statute."—A railway company cannot be required to give particulars of the defence of "not guilty by statute." The right to plead such a defence being expressly preserved by Rule 286, the application of Rule 299 is excluded.

Jennings v. Grand Trunk R. W. Co. (1880), 11 P.R. 300, overruled. *Taylor v. Grand Trunk R. W. Co.*, 148.

PARTIES.

Third Party Procedure—Relief Over—Identity of Claims.]

—The owner and occupant of a house in a town sued a gas company for damages alleged to have been sustained by reason of an escape of gas from the defendants' pipes upon the highway into the plaintiff's premises. The defendants served a third party notice upon the town corporation, alleging that the break in the pipes was caused by the negligence of the corporation in the course of construction of a sewer in the same highway:—

Held, that there was no right to indemnity or relief over, within the meaning of Rule 209, as the damages which might be recovered by the plaintiff against the defendants were not the measure of the damages which might be

recovered by the defendants against the third parties. *Milner v. Sarnia Gas and Electric Co.*, 546.

PATENT FOR INVENTION.

1. *Contract—Grant—License—Revocation—Right to Manufacture—Changes in Article Manufactured—Reformation of Contract.*]—The plaintiff, the inventor and patentee of improvements in automatic air brakes, made an agreement in writing with the defendants, a railway company, by which he granted to them the license and right to use the invention and to equip their rolling stock in whole or in part therewith during the term of the patent, and agreed to supply them with the air brake and all necessary equipment up to 5,000 sets, and to make all repairs to brakes and equipments so supplied, at the actual first cost plus 15 per cent. upon such cost, to be paid by the defendants. The defendants were not to pay anything for the right, the main consideration to the plaintiff for the grant being the advertisement which his invention would get:—

Held, that this agreement did not operate as a license revocable at the will of the plaintiff, but as a grant of a right in respect of the invention, containing reciprocal obligations on the part of the grantor and grantees.

Guyot v. Thomson (1894), 11 R.P.C. 541, followed.

Semble (assuming that there was a revocable license), that an

assignment of the patent by the plaintiff, after an action had been begun by him to restrain the defendants from infringing the patent, did not revoke such license.

Held, also, that the agreement conferred upon the railway company the right to manufacture the patented brakes which they were entitled under the agreement to use upon their railway; and the plaintiff was not entitled, upon the evidence, to have the agreement reformed so as to take away that right. *Steam Stone Cutter Co. v. Shortsleeves* (1879), 4 Ban. & Ard. 364, and *Illingworth v. Spaulding* (1890), 43 Fed. Rep. 827, approved.

But the agreement did not justify the making by the defendants of certain important changes in the mode of construction of the brake and in using the brake so altered, especially if they were using and claiming to use it as the plaintiff's invention, and so describing it. *McLaughlin v. Lake Erie and Detroit River R. W. Co.*, 190.

2. *Assignment for Limited Period—Sale Thereafter.*]—A person who is the assignee of a patent right for a limited period with a right of purchase, but who, at the expiration of such period, elects not to purchase, and re-assigns the patent, cannot thereafter sell the patented article though made during the time he was assignee, his right to make and sell being restricted to such limited period; and under the powers conferred on the Court

by sec. 31 of the Patent Act, R.S.C. 1886 ch. 61, an injunction may be issued restraining such sale. *Bennett v. Wortman*, 292.

PLEADING.

1. *Reply—Departure—Contract—Repudiation—Reformation.*]—Briefly, the pleadings were as follows: The plaintiffs alleged that they supplied the defendants, under an agreement, with patent brakes for use on their railway, and that the defendants altered them and infringed the plaintiffs' patent. The defendants alleged that they had a right under their agreement with the plaintiffs to do what they had done. The plaintiffs, by their reply, denied any such agreement, and alleged that if the written agreement did give any such right, it was not the true agreement, and they asked to have it reformed:—

Held, that there was no departure in the reply; for the fact that, by mutual mistake, the written agreement did not set forth the true agreement between the parties in this particular respect was a perfectly good answer to the plea of the agreement, and it was not necessary that the agreement should be actually corrected before the mistake could operate as an answer to its terms.

Held, also, that, even if the portion of the agreement upon which the defendants relied was contained in the same instrument as the "agreement" mentioned in the statement of claim,

the plaintiffs might, consistently with their relying upon one part of it, ask to have another part reformed. *MacLaughlin v. Lake Erie and Detroit River R. W. Co.*, 151.

2. *Reply—Regularity—Title to Land—Assignment of Mortgage—Attacking.*]—The statement of claim, in an action for a declaration that the plaintiff was entitled to a share in certain lands and to recover possession, alleged that the defendant society were in possession of the whole of the lands and in receipt of the rents and profits under a mortgage of a share or interest therein, made by two of the remaining defendants, who derived their title from the plaintiff's father or some of his heirs. The defendant society sought to defend their possession and to hold the rents and profits by setting up in their statement of defence a mortgage made by the plaintiff's father to one L. and by him assigned to the defendant society. The plaintiff replied that there was no consideration for the assignment of such mortgage, and that the alleged assignor was at the time of making it of unsound mind, to the knowledge of the defendant society:—

Held, that the reply raised an issue which the plaintiff was entitled to have tried, and it was not irregular or improper to raise it at that stage. *Smith v. Smith*, 410.

3. *Statement of Claim—Striking Out—Cause of Action*

— *Embarrassment*—*Demurrer*—*Amendment*—*Terms*—*Rules* 259, 261, 298.]—In an action to recover the amount of an insurance upon the life of another person under a policy issued by the defendants and assigned to the plaintiff, the plaintiff alleged, in the alternative, that the defendants had reinsured with another company, and after the death of the insured the defendants requested the reinsuring company to pay the amount reinsured to the defendants, which the reinsuring company did, with a direction to pay the amount over to the plaintiff, which the defendants refused to do:—

Held, that this amounted to an allegation that the defendants had received a sum of money to the use of the plaintiff, which they refused to pay over to him, and that they were trustees thereof for him; and the paragraphs of the statement of claim containing the alternative allegations should not be struck out summarily under Rule 261 as disclosing no reasonable cause of action, nor under Rule 298 as tending to prejudice, embarrass, or delay the fair trial of the action.

Rule 261 is intended to apply only where the pleading is obviously bad. A party may still have a point of law disposed of, although he is not at liberty to demur: Rule 259.

Attorney-General of the Duchy of Lancaster v. London and North Western R.W. Co., [1892] 3 Ch. 274, and *Kellaway*

v. Bury (1892), 66 L.T.N.S. 599, followed. *Brophy v. Royal Victoria Life Ins. Co.*, 651.

Irrelevancy—*Striking Out*—*Pleading Over.*]—See DISCOVERY.

Libel and Slander—*Justification*—*Scandalous and Embarrassing.*]—See DEFAMATION, 2.

“*Not Guilty by Statute*”—*Particulars.*]—See PARTICULARS.

PRACTICE.

1. *Frivolous Action*—*Action by Wife for Alienation of Her Husband's Affections*—*Cons. Rules 259-261.*]—The plaintiff brought this action against another woman for alienating her husband's affections, committing adultery with him and inducing him to leave the plaintiff and go to the United States, whereby she was deprived of the services and support of her husband and of the exercise of the remedies provided by the Criminal Law for the support of wives.

Held, that *Lellis v. Lambert* (1897), 24 A.R. 653, leaving nothing to be said in support of the plaintiff's action, the same must be dismissed with costs. *Lawry v. Tuckett-Lawry*, 162.

2. *Master's Report*—*Confirmation*—*Notice of Filing*—*Non-appearance*—*Con. Rules 573, 694, 769.*]—*Con. Rules 694 and 769*, requiring notice of filing a Master's report as a condition of

its becoming absolute, are governed by Con. Rule 573; and, therefore, notice of filing a Master's report need not be served upon a defendant who has not entered an appearance in the action; and where there is no defendant upon whom notice of filing need be served, the report becomes absolute upon the expiration of fourteen days from the filing. *Toronto General Trusts Corporation v. Craig*, 238.

3. *Third Party Procedure—Indemnity—Directions—Order Allowing Notice—Appeal.*—In an action to recover damages for the death of an employé of the defendants, who was killed at the crossing of defendants' railway with another railway, the defendants obtained an *ex parte* order allowing them to serve a third party notice upon the other railway company, claiming indemnity under an agreement whereby the latter company were allowed to put in the crossing at the point where the accident happened, upon their indemnifying the defendants against any claim for damages arising during the progress of the work. The defendants asserted and the other company denied that the accident in question happened during the progress of the work:—

Held, that it was desirable that the question as to the defendants' liability to the plaintiff should be established in such a way as to be binding upon the third parties, although all the matters in dispute between the

defendants and the third parties could not be determined in the action.

Baxter v. France (No. 2), [1895] 1 Q.B. 591, distinguished.

Form of order giving directions as to trial and questions of costs in such a case, settled.

Semble, referring to *Baxter v. France*, [1895] 1 Q.B. 455, 458, that it was the duty of the third parties, if they objected to being added, to appeal within due time against the order allowing the notice to be served upon them. *Holden v. Grand Trunk R.W. Co.*, 421.

4. *Winding-up Act—Service of Petition—Time.*—Under sec. 8 of the Winding-up Act, R.S.C. 1886, ch. 129, a petition was *held*, properly lodged, where notice of its presentation was given on the 4th for the 8th November. *Re Arnold Chemical Co.*, 671.

5. *Third Parties—Notice—Time—Enlarging—Con. Rules 209, 353.*—In an action for damages for trespasses to land and cutting down and removing timber and wood, the defendants by their statement of defence justified the acts complained of under agreements which, they alleged, authorized those acts, and to which the plaintiff's rights in the land were subject. The defendants served a notice upon third parties claiming indemnity or relief over in respect of all liability which the defendants might be under to the plaintiff by reason of acts done by them on the faith of representations

made by the third parties, who had sold to the defendants the standing timber on the land and the right to remove it, representing that they had acquired title from the owners under whom the plaintiff derived his title :—

Held, that the third party notice was served too late (Rule 209), having been served not only after the time for the delivery of the defence, but after the pleadings were closed and the action entered for trial; and, under the circumstances, the time should not be enlarged by virtue of the provisions of Rule 353.

Semble, that it was not a proper case for contribution, indemnity, or relief over, under Rule 209. *Parent v. Cook*, 709.

Cupias—Intent to Defraud—Onus—Bond—Exoneretur.] —See ARREST.

Conditional Allowance of Appeal—Reduction of Damages—Election.]—See APPEAL.

Divisional Court—Arbitration Act.]—See COURT.

New Trial—Weight of Evidence—Expert Testimony.] —See TRIAL.

Opening Foreclosure—Judgment Creditor.] —See MORTGAGE, 3.

Particulars—“Not Guilty by Statute.”]—See PARTICULARS.

Parties—Relief Over—Third Party Procedure.]—See PARTIES.

Questions for Jury—Malpractice.] —See MEDICINE AND SURGERY.

Sale by Court—Abortive Sale—Subsequent Order.] —See TRUSTEE.

Security for Costs.] —See COSTS, 2.

Service out of Jurisdiction.] —See DOMICIL—MORTGAGE, 1.

Staying Proceedings—Action in Foreign Court.]—See STAY OF PROCEEDINGS.

Summary Judgment—Bill of Exchange—Conditional Delivery.]—See SUMMARY JUDGMENT, 2.

Surrogate Court Proceedings—Removal into High Court—Security for Costs.]—See SECURITY FOR COSTS, 2.

See PLEADING, 1, 2.

See SECURITY FOR COSTS, 1.

PRINCIPAL AND AGENT.

Promoters of Company—Fraud—Deceit.] —See COMPANY, 3.

PRINCIPAL AND SURETY.

Mortgagor—Purchaser of Equity of Redemption—Covenant.]—See MORTGAGE, 4.

Promissory Note—Renewal—Omission of one of Several Sureties.] —See BILLS OF EXCHANGE, 3.

PUBLIC SCHOOL.

1. *School Board—Notice of Meeting—Termination of Contract with School Teacher—Action for Salary—Jurisdiction of Division Court.*—An agreement between school trustees and the plaintiff, as teacher, gave either party a right to terminate it on one month's notice. The former notified the plaintiff of its termination pursuant to a resolution passed at a board meeting, notice of which, however, had not stated that this matter would be considered, of which some of the trustees were unaware, and two of them did not attend:—

Held, that this was not a proper exercise of the option to terminate, and had not that effect.

The plaintiff brought this action in the division court, claiming a balance of salary, and had recovered judgment for \$132.03:—

Held, that the matters of difference between the parties fell within R.S.O. 1897, ch. 292, sec. 77, sub-sec. 7, and the division court had jurisdiction. *Greenlees v. Picton Public School Board*, 387.

2. *Expenditure—Annual Estimates—Revision—Powers of Municipal Council—Salaries of Teachers—Contracts with—Repairs—Furniture—Discretion—Medals—Liabilities of Previous Year—"Miscellaneous"—Rent of School Rooms.*—Upon an application by the school board for a mandamus to

the city corporation to levy certain sums of money alleged by the board to be required for school purposes for the year 1901, it appeared that the council of the corporation had received the estimates of the board of the amounts required, and had struck off certain items in whole, and reduced others, upon various grounds.

At the end of the year 1900 all the teachers who were engaged or re-engaged for 1901 signed a contract in writing with, and executed under the seal of the board, by which the teachers were employed by the board "in the school and at the yearly salary set opposite his or her name respectively . . . or at such salary and in such school or division of the same as they may from time to time appoint, for the term of one year, beginning on the 1st of January, 1901, and ending on the 31st December, 1901;" and the board further thereby agreed "that they . . . would pay such salary to the said teacher monthly;" and it was further agreed that the board and the teacher might, at their option respectively, terminate the engagement by giving notice in the manner provided by the school regulations. The salary payable to each teacher under this agreement was set opposite his or her name in a schedule attached to it. In March, 1901, the board passed a resolution increasing the salaries of all the teachers who had been employed during 1900, the result being that the aggregate

salaries of the teachers for 1901 who had signed the agreement at the end of 1900 were increased by about \$41,000 beyond the amount payable to them under the terms of that agreement. The city corporation refused the request of the board to levy the sum required to pay these additions to the salaries of the teachers, upon the ground that they were voluntary and unauthorized :—

Held, that it is only when it is made to appear that the expenditure would be clearly an illegal one, or *ultra vires* the school board, that the council is justified in refusing to raise the sum required by the board. It was by no means clear that, after the resolution of March, 1901, the board was not under a legal obligation to pay the larger salaries; and it was not intended that the council should inquire into the validity of contracts entered into in good faith between the board and teachers, and treated and acted on by them as valid. All that the council has a right to ask is, that what the Legislature has termed an "estimate" shall shew that the board has in good faith estimated the amounts required to meet the expenses of the schools for the current year, and the purposes for which the sums are required, in such a way as to indicate that they are purposes for which the board has the right to expend the money of the ratepayers, and, when that has been done, the duty is imposed upon the council of

raising by taxation (except in the special case for which provision is made by sec. 74 of the Public Schools Act, 1 Edw. VII. ch. 39 (O.)), the sums required according to the estimate.

Semble, that, even if an action by a teacher for salary on the basis of the March resolution would fail if it were set up in answer that the agreement sought to be enforced was not in writing, signed by the parties to it, and under the seal of the corporation, the board could not be compelled to set up such a defence, and if they refused to do so and wished to pay the salary in accordance with the resolution, the council would not be justified in refusing to provide the money.

2. For repairs, the estimate submitted by the board was: "Ordinary yearly repairs and alterations to school property under the Act, based on expenditure of the past ten years, \$25,000."

Held, a sufficient estimate to cast upon the council the duty of levying and collecting the whole \$25,000; more especially as it was supplemented, upon a request being made for further information, by a detailed statement of repairs to be made, shewing the nature of the repairs to be made on each building, but not the probable cost of these repairs separately; the word "alterations" used in the estimate might have covered additions to school houses (sec. 76, sub-sec. 1), but the detailed

statement shewed that repairs only were intended.

3 Another item was: "Dais and railings in board rooms, and counters, partitions, screens, etc., in office, \$6,000—to carry out plans approved by the city council of last year, for which they included the item in a money by-law." The board rented from the city corporation a part of a building for use as a board room and for offices, and the \$6,000 was for the fittings and furnishings thereof.

Held, having regard to the fact that plans and an estimate of the cost were approved by the council of 1900, and a by-law in that year provisionally passed and submitted to the electors for borrowing \$6,000 to defray that cost, that the estimate was sufficient.

Held, also, that it did not provide for expenditure of the class dealt with by sub-sec. 1, of sec. 76.

Held, also, that, although there is no direct authority in the Public Schools Act for the expenditure of money in furnishing board rooms and offices, such authority may be implied from secs. 56 and 65 of that Act, and sec. 8 (25) of the Interpretation Act R.S.O. 1897 ch. 1.

Held, also, that neither the council nor the Court could deal with the question whether the amount was extravagant, nor, where there was good faith on the part of the board, call upon it to give reasons for the exercise of its discretion.

4. *Held*, that an item of \$50, part of the sum asked for medals and certificates for pupils, should not have been disallowed by the council. It is within the general powers of school boards to provide such recognitions of standing and merit, at the expense of the ratepayers.

5. *Held*, that items intended to provide for liabilities incurred in 1900, the payment of which was deliberately held over until 1901, were properly disallowed by the council as not forming part of the expenses of the schools under the charge of the board for 1901.

6. Under the head of "miscellaneous, based on the expenditure of past years," the board asked for \$1,000. The council asked for no details of this, but struck it out *in toto*.

Held, that the estimate was sufficient, and that the item should not have been struck off without particulars being asked for, when they were asked for in other cases.

7. The council struck off \$4,250 from an estimate of \$11,750 for new furniture in new school rooms, and renewing the furniture in certain existing school rooms where it was worn out, and for repairs to old furniture.

Held, that this estimate, with the details given at the request of the council, was sufficient, and should have been accepted. The cost of the furniture of a school room is not part of the cost of the erection of a school house under sec. 75 of the Act.

Held, that the item of \$220 for rent of school rooms to be used by the children taken care of by "The Girls' Home" should not have been struck out: sec. 65, sub-secs. 3 and 4, and sec. 67. *Re Toronto Public School Board v. City of Toronto*, 727.

PROHIBITION.

1. *Foreign Judgment on a Promissory Note—Effect of—Recovery on—Cause of Action—Division Court—Jurisdiction.*]—A foreign judgment against the maker of a promissory note represents a simple contract debt only, and one not ascertained by the signature of the defendant; and prohibition was granted to restrain proceeding with a plaint in a division court on a foreign judgment for \$232.37 recovered on such a note where the plaintiff abandoned the excess over \$200, and sought to recover judgment for the balance. *Re McMillan and Fortier*, 231.

2. *Division Courts—Transfer of Action—Order Issued Under sec. 90 Instead of sec. 91 of Act.*]—Where an order was made by a division court Judge for the transfer of an action brought in that division, to the division court of another county, the order being made under the powers conferred by sec. 90 of the Division Courts Act, R.S.O. 1897, ch. 60, whereas, under the circumstances, the order should have been made under sec. 91, an order for prohibition was

made prohibiting the division court to which the transfer had been made from acting under the order of transfer, without prejudice to the right to apply for an order under sec. 91. *In re Frost v. McMillen*, 303.

3. *Division Court—Order for Committal—Previous Order for Payment—Affidavit.*]—The plaintiff recovered judgment against the defendant in a Division Court action for a debt contracted before the passing of the Act, 61 Vict. ch. 15 (O.), and the defendant was at the hearing ordered to pay the amount of the judgment forthwith:—

Held, that the Court had jurisdiction under sub-sec. 5 of sec. 247 of the Division Courts Act, R.S.O. 1897, ch. 60, upon examination of the defendant on an after-judgment summons, to make an order for her committal, without a previous order for payment based upon such an examination and default thereunder.

Where it appears that a judgment debtor has been examined before the Judge, his order for committal must, on a motion for prohibition, be treated as a complete adjudication as to that which must be made to appear to warrant the making of an order under sub-sec. 5 of sec. 247.

Semble, that if the affidavit of the plaintiff required by sec. 243 to be filed before the issue of the summons were not filed, it would not be open to the defendant, after appearing in obedience to the summons, to

raise an objection to the jurisdiction on that ground; and, the defect not appearing on the face of the proceedings, prohibition in such a case would not be granted.

Semble, also, had the debt been contracted consequently to the passing of 61 Vict. ch. 15 (O.), the result would have been the same. *Re Hawkins v. Batzold*, 704.

QUARTER SESSIONS.

Record of Acquittal—Defendant's Right to.]—See MANDAMUS.

RAILWAYS.

1. *Right to Cross Streets—Expropriation Proceedings or Compensation—Necessity for—Extension of City Limits—51 Vict. ch. 53, sec. 9 (O.)—Toll Road, Purchase of—Effect of.*]—Railways incorporated by the Dominion Parliament, where in the construction of their lines of railways, they have complied with the requirements of the Dominion Railway Act and obtained the consent of the railway committee, have the right to cross the highways of a city without taking expropriation proceedings under the Railway Act, or without making any compensation to the city therefor.

Where under the powers conferred by 51 Vict. ch. 53, sec. 9 (O.) for extending the limits of the city of Ottawa, the city

acquired at an agreed price, part of the road of a toll road company within such extended limits, such part thereupon ceased to have its previous character of a toll road, and became a highway like the other public streets of the city. *Canada Atlantic R.W. Co. v. Corporation of City of Ottawa*, 336.

2. *Carriage of Animals—Nuisance—Proper Exercise of Powers—Negligence.*]—Railway companies to which the Dominion Railway Act applies are authorized by law to carry cattle and hogs, and as a necessary incident thereto for the purpose of shipping the animals to have pens for herding them, and they are not liable if, in the proper exercise of their powers in doing so, without negligence they create a nuisance.

London and Brighton R.W. Co. v. Truman (1885), 11 App. Cas. 45, followed. *Bennett v. Grand Trunk R.W. Co.*

REVENUE.

Succession Duties—Double Duty—Power of Appointment—Statutes.]—The testator died in England on the 25th February, 1901, possessed of and entitled to lands in Ontario. He left a will and four codicils by which his sister was named as sole executrix and trustee, and was bequeathed the income of his whole estate for life and given a general power of appointment by will in respect of the whole estate. The sister

died on the 2nd March, 1901, without having proved the will and codicils and without having taken upon herself any of the burdens thereof. By her will, made in 1873, she gave all her estate to the defendant, who obtained from the High Court of Justice in England letters of administration to the estates of the testator and his sister with the wills annexed. He then applied to the Surrogate Court in Ontario for ancillary letters of administration to both estates and for legal authority to deal with the lands in Ontario:

Held, that, having regard to the provisions of cl. (g) of sec. 4 of the Succession Duty Act, R.S.O. 1897, ch. 24 (inserted by sec. 11 of 62 Vict. (2) ch. 9), the lands in Ontario were subject to two duties, as having devolved under both wills.

Held, also, that the provisions of sub-sec. 2 of sec. 6 of 1 Edw. VII. ch. 8 (O.) were not declaratory of the previous law nor retroactive, and, having become law since the two deaths, did not apply to this case.

Attorney-General v. Theobald (1890), 24 Q.B.D. 557, distinguished. *Attorney-General for Ontario v. Stuart*, 403.

RULES.

Con. Rules 162 1, (b) (d) (e).
See MORTGAGE, 1.

Con. Rule 162 (1) (c).— See DOMICIL.

Con. Rule 209.— See PARTIES, 1—PRACTICE. 5.

Con. Rule 259.— See PLEADING, 3.

Con. Rule 259-261.— See PRACTICE, 1.

Con. Rule 261.— See PLEADING, 3.

Con. Rule 286.— See PARTICULARS.

Con. Rule 298.— See PLEADING, 3.

Con. Rule 299.— See PARTICULARS.

Con. Rule 353.— See PRACTICE, 5.

Con. Rule 573.— See PRACTICE, 2.

Con. Rule 616.— See ALIMONY, 2—SUMMARY JUDGMENT, 2.

Con. Rule 694.— See PRACTICE, 2.

Con. Rule 769.— See PRACTICE, 2.

Con. Rule 818.— See COURT OF APPEAL.

SECURITY FOR COSTS.

1. *Both Parties out of Jurisdiction — Rival Claimants of Fund.*—Where both plaintiffs and defendants were resident out of Ontario and both claimed a fund of \$500 bequeathed by a will, they were required to give security, each to the other, for the costs of an issue directed to be tried.

In re La Compagnie Générale d'Eaux Minérales, [1891] 3 Ch. 451, followed.

In re Societé Anonyme des Verreries de l'Etoile (1893), 10 Pat. Cas. 290, and *In re Miller's Patent* (1894), 11 Pat. Cas. 55, distinguished. *Sinclair v. Campbell et al*, 1.

2. *Defendant out of Jurisdiction—Surrogate Court Proceedings—Real Actor.*—The plaintiff applied to a surrogate court for grant to him of letters probate as the executor named in a will. The defendant having filed a caveat and entered an appearance, the plaintiff delivered a statement of claim praying the Court to decree probate of the will in solemn form, and the defendant delivered a statement of defence disputing the factum of the will. The plaintiff then obtained an order for the removal of the proceedings into the High Court:—

Held, that, according to the practice and procedure of the High Court, which was applicable, the plaintiff was not entitled to security for costs from the defendant, who was out of the jurisdiction. *Ward v. Benson*, 366.

SHARES AND SHAREHOLDERS.

Necessity for Allotment.—See COMPANY, 4.

SHELLEY'S CASE.

See WILLS, 2, 8.

SPECIAL OCCUPANT.

See WILL, 7.

SPECIFIC PERFORMANCE.

Financial Means — Pleading.—See DISCOVERY.

STATUTE.

Interpretation — Retrospectivity.—See INSURANCE, 2.

STATUTES.

21 Hen. VIII., c. 5.....
See EXECUTORS AND ADMINISTRATORS, 511.

14 Geo. III., ch. 48, sec. 1.....
See INSURANCE, 2.

49 Vict., ch. 37, sec. 22 (Municipal Amendment Act, 1886)....
See DRAINAGE, 1.

53 Vict., ch. 31 (D.) (Bank Act), sec. 46.
See BANKS AND BANKING.

53 Vict., ch. 33 (D.) (Bills of Exchange Act), sec. 21, sub-sec. 3.
See SUMMARY JUDGMENT, 2.

53 Vict., ch. 33 (D.) (Bills of Exchange Act), sec. 30, sub-sec. 2
See SUMMARY JUDGMENT, 1.

53 Vict., ch. 33 (D.) (Bills of Exchange Act), sec. 72, sub-sec. 2, sec. 74.
See BILLS OF EXCHANGE, 1.

55-56 Vict., ch. 29, (D.) (Criminal Code), sec. 194.
See CONVICTION.

55-56 Vict., c. 29 (D.) (Criminal Code), sec. 396.
See CRIMINAL LAW, 1.

55-56 Vict., ch. 29 (Criminal Code) secs. 752, 783 (a) (b).....
See CRIMINAL LAW, 3.

55-56 Vict., ch. 29 (D.) (Criminal Code), sec. 783, sub-sec. (c).
See TRESPASS.

R.S.B.C., ch. 44 (British Columbia Companies Act), sec. 30.....
See COMPANY, 4.

- R.S.C., ch. 61 (Patent Act), sec. 31.
See PATENT OF INVENTION, 2.
- R.S.C. 1886, ch. 129 (Winding-Up Act), sec. 8.....
See PRACTICE, 4.
- R.S.C. 1886, ch. 129 (Winding-Up Act), sec. 9.....
See COMPANY, 5.
- 60-61 Vict., ch. 34 (D.), (Act respecting Supreme Court of Ontario), sec. 1.....
See COURT OF APPEAL.
- R.S.O. 1887, ch. 157 (Ontario Joint Stock Companies Letters Patent Act), sec. 38
See STREET RAILWAY, 2.
- R.S.O. 1897, ch. 1 (Interpretation Act), sec. 8 (25).....
See PUBLIC SCHOOLS, 2.
- R.S.O. 1897, ch. 24 (Succession Duty Act), sec. 4, cl. (g).....
See REVENUE.
- R.S.O. 1897, ch. 48 (Bills of Sale and Chattel Mortgage Act), sec. 11
See CHATTEL MORTGAGE.
- R.S.O. 1897, ch. 51 (Ontario Judicature Act), sec. 54
See COURT OF APPEAL.
- R.S.O. 1897, ch. 51 (Ontario Judicature Act), sec. 57, cl. 10.....
See STAY OF PROCEEDINGS.
- R.S.O. 1897, ch. 51 (Ontario Judicature Act), sec. 67, sub-sec. 1, cl. (a).....
See COURT.
- R.S.O. 1897, ch. 59 (Surrogate Courts Act), sec. 73.....
See EXECUTORS AND ADMINISTRATORS, 511.
- R.S.O. 1897, ch. 60 (Division Court Act), secs. 90, 91.....
See PROHIBITION, 2.
- R.S.O. 1897, ch. 60 (Division Court Act), sec. 190.....
See DIVISION COURTS.
- R.S.O. 1897, ch. 60, secs. 243, 247, sub-sec. 5
See PROHIBITION, 3.
- R.S.O. 1897, ch. 62 (Arbitration Act), sec. 8
See ARBITRATION AND AWARD, 2.
- R.S.O. 1897, ch. 62 (Arbitration Act), sec. 8 (b).....
See ARBITRATION AND AWARD, 3.
- R.S.O. 1897, ch. 62 (Arbitration Act), sec. 41.....
See COURTS, 1.
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- R.S.O. 1897, ch. 77 (Execution Act)
See EXECUTORS AND ADMINISTRATORS, 1.
- R.S.O. 1897, ch. 119 (Improvements under Mistake of Title).
See WILL, 6.
- R.S.O. 1897, ch. 119 (Law and Transfer of Property), sec. 11.
See ESTATE.
- R.S.O. 1897, ch. 121 (Mortgages of Real Estate), sec. 2, sub-secs. 1 and 2.....
See MORTGAGE, 2.
- R.S.O. 1897, ch. 127 (Devolution of Estates Act)
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- R.S.O. 1897, ch. 127 (Devolution of Estates Act).....
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- R.S.O. 1897, ch. 128 (Wills Act), sec. 36
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- R.S.O. 1897, ch. 129 (The Trustee Act), sec. 32.....
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- R.S.O. 1897, ch. 133 (Real Property Limitation Act), secs. 2 (3), 43, 44.....
See LIMITATION OF ACTIONS, 1.
- R.S.O. 1897, ch. 148 (Mortgages and Sales of Personal Property).....
See COMPANY, 6.
- R.S.O. 1897, ch. 149 (Conditional Sales of Chattels).....
See COMPANY, 6.

R.S.O. 1897, ch. 160 (Workmen's Compensation for Injuries Act), sec. 9.....

See MASTER AND SERVANT, 2.

R.S.O. 1897, ch. 166 (Fatal Accidents Act).....

See EXECUTORS AND ADMINISTRATORS, 3.

R.S.O. 1897, ch. 191 (Companies Act)

See COMPANY, 4.

R.S.O. 1897, ch. 207 (Railway Act of Ontario), secs. 9, 10, 13-20.

See COMPANY, 2.

R.S.O. 1897, ch. 223 (The Municipal Act), secs. 128 (1), 220 (2).....

See MUNICIPAL ELECTIONS.

R.S.O. 1897, ch. 223 (Municipal Act), sec. 467.....

See ARBITRATION AND AWARD, 3.

R.S.O. 1897, ch. 223 (Municipal Act), sec. 639.....

See WAY.

R.S.O. 1897, ch. 224 (Assessment Act), secs. 24, 60, 129, 133-135.....

See ASSESSMENT AND TAXES, 4.

R.S.O. 1897, ch. 224 (Assessment Act), sec. 46.....

See ASSESSMENT AND TAXES, 3.

R.S.O. 1897, ch. 224 (Assessment Act), sec. 135 a (1) 3.....

See ASSESSMENT AND TAXES, 1.

R.S.O. 1897, ch. 224 (Assessment Act), sec. 218

See ASSESSMENT AND TAXES, 2.

R.S.O. 1897, ch. 226 (Drainage Act), sec. 75.....

See DRAINAGE, 2.

R.S.O. 1897, ch. 248 (Public Health Act)

See CONVICTION.

R.S.O. 1897, ch. 256 (Factories Act), sec. 14.....

See MASTER AND SERVANT, 4.

R.S.O. 1897, ch. 271 (Protection of Sheep), secs. 11-13, 15.....

See JUSTICE OF PEACE.

R.S.O. 1897, c. 292 (Public Schools Act), sec. 77, sub-sec. 7

See PUBLIC SCHOOL, 1.

61 Viet., ch. 15 (O.).....

See PROHIBITION, 3.

62 Viet., 2nd sess., ch. 15 (O.) (Act to amend the Law respecting the Liability of Trustees)

See WILL, 3.

62 Viet., 2nd sess., ch. 27, sec. 11 (O.).....

See ASSESSMENT AND TAXES, 1.

63 Viet., ch. 17, sec. 18 (O.).....

See SURROGATE COURT.

63 Viet., ch. 34, sec. 3 (O.).....

See ASSESSMENT AND TAXES, 3.

1 Edw. VII., ch. 8, sec. 6, sub-sec. 2 (O.).....

See REVENUE.

1 Edw. VII., ch. 21 (O.).....

See INSURANCE, 2.

1 Edw. VII., ch. 39 (O.) (Public Schools Act), secs. 56, 65, 67, 74, 75, 76, sub-sec. 1.....

See PUBLIC SCHOOLS, 2.

1 Edw. VII., ch. 72 (O.) (Private Act)

See DRAINAGE, 2.

STATUTE OF LIMITATIONS.

Husband and Wife—Loan.]

—See HUSBAND AND WIFE.

STAY OF PROCEEDINGS.

Action in Foreign Court—Reasons for Bringing—Judicature Act, sec. 57, (10).]—Where there are substantial reasons for the double litigation, the Court will not stay proceedings in an action in Ontario until after the determination of another action for the same cause pending in a foreign Court.

The power to stay proceedings under sec. 57, cl. 10, of the Judicature Act, R.S.O. 1897, ch. 51, is a discretionary one, and the English cases are authorities as to the exercise of the discretion, although there is no similar statutory provision in England.

Where the defendant, resident in Ontario, was sued there upon a promissory note, the Court refused to stay the action until after the determination of an attaching proceeding in a foreign Court, the only effect of which, if successful, would be to make available towards payment of the note certain stock in a company domiciled in the foreign country. *First Natchez Bank v. Coleman*, 150.

STREET RAILWAY.

1. *Highway — Removal of Snow.*—By the provisions of a municipal by-law, to which a street railway company were bound to conform, the company were obliged to remove snow from their tracks in such a manner as not to obstruct or render unsafe the free passage of sleighs or other vehicles along or across the street. After a heavy snow-fall the company removed the snow from their tracks, the result being that there was a bank of several inches at each side of the tracks to the level of the snow-covered portions of the street:—

Held, that the company had not discharged their obligation

and that they were liable to indemnify the city against damages recovered against the city by a person who had in consequence of the bank been upset while driving along the street.

Judgment of Rose, J., affirmed. *Mitchell v. City of Hamilton*, 58.

2. *Mortgage — Future Acquired Property — Fixtures — Rolling Stock — Execution — Company.*—An electric street railway company incorporated under the Ontario Joint Stock Companies Letters Patent Act, R.S.O. 1887, ch. 157, and subject to the provisions of the Street Railway Act, R.S.O. 1887, ch. 171, gave to trustees for holders of debentures of the company a mortgage upon the real estate of the company, together with all buildings, machinery, appliances, works and fixtures, etc., and also all rolling stock and all other machinery, appliances, works and fixtures, etc., to be thereafter used in connection with the said works, etc. The by-laws of the directors and shareholders (who were the same persons and only five in number) authorizing the giving of the mortgage directed it to be given upon all the real estate, plant, franchises, and income of the company, and the debentures stated that they were secured by mortgage of the real estate, franchises, rolling stock, plant, etc., acquired or to be acquired:—

Held, that sec. 38 of R.S.O. 1887, ch. 157, does not restrict

the power of mortgaging to the existing property of the company and that a company is invested with as large powers to mortgage its ordinary after acquired property as belong to a natural person; that the mortgage in terms covered after acquired property, and even if not authorized in this respect upon a strict reading of the by-laws had been acquiesced in and ratified and was binding.

Judgment of a Divisional Court affirmed.

Held, also, that the rolling stock, poles, wires, etc., formed an essential part of the corpus of what must be regarded as an entire machine, and were therefore fixtures and not seizable under execution to the prejudice of the mortgagees.

Judgment of Armour, C.J., affirmed. *Kirkpatrick v. Cornwall Electric Street R. W. Co., Ltd.*, 113.

See NEGLIGENCE, 1, 2.

SUCCESSION DUTY.

See REVENUE.

SUMMARY JUDGMENT.

1. *Promissory Note—Holder for Value—Fraud—Onus.*—Where the maker and one of the indorsers of the promissory note sued on, in answer to a motion by the plaintiff for summary judgment under Rule 603, swore that they were induced to become parties to the note by fraudulent misrepresenta-

tions made by their co-defendants, particulars of which they set out, whereof they had reason to believe the plaintiff had notice:—

Held, having regard to sec. 30, sub-sec. 2, of the Bills of Exchange Act, that they were entitled to unconditional leave to defend, notwithstanding the plaintiff's affidavit that he was a holder for value.

Fuller v. Alexander (1882), 47 L.T.N.S. 443, followed. *Farmer v. Ellis*, 544.

2. *Promissory Note—Conditional Delivery—Notice—Innocent Holders*—53 Vict., ch. 33, sec. 21, sub-sec. 3 (D.).—On a motion for summary judgment under Con. Rule 616 by the payee of a promissory note against the maker, who alleged on his examination for discovery that he made and delivered the note to a trading company for a purpose other than that for which the company deposited it with the plaintiffs, but did not state that the plaintiffs had notice thereof:—

Held, that the plaintiffs were entitled to judgment. *The Ontario Bank v. Young*, 761.

SUPREME COURT OF CANADA.

Staying Proceedings Pending Appeal to.—See COURT OF APPEAL.

SURROGATE COURT.

Guardian Appointed by—Right to Pass Accounts before

Surrogate Judge—63 Vict. ch. 17, sec. 18 (O.).]—The Judge of a surrogate court has no authority to pass the accounts of the guardian of an infant appointed by such court. Sec. 18 of 63 Vict. ch. 17 (O.) does not apply, such guardian not being a trustee within the meaning of the section.

Held, also, that under the circumstances of this case, six per cent. interest was a fair rate to charge the guardian on the moneys in his hands. *Murdy v. Burr*, 311.

Defendant out of Jurisdiction—*Removal into High Court.*]—See SECURITY FOR COSTS, 2.

Jurisdiction over Executors and Administrators—Rule 19.]—See EXECUTORS AND ADMINISTRATORS, 2.

TENANCY IN COMMON.

Title by Prescription—*Joint Tenancy.*]—See ESTATE.

TENANT FOR LIFE.

See WILL, 1.

TENDER.

Denial of Contract—*Necessity for.*]—See DISCOVERY.

TRADE-MARK.

Descriptive Letters—*Registration*—*Secondary Meaning*—*Proof of Acquisition of*—*Fraud*—*Deception.*]—The letters

C.A.P., standing for the words "cream acid phosphates," being descriptive merely, are not the proper subject of a trade-mark, and registration of them as a trade-mark, under the Trade-Mark and Design Act, will not give a right to the exclusive use of them.

Partlo v. Todd (1888), 17 S.C.R. 196, followed.

Words or letters which are primarily merely descriptive may come to have in the trade a secondary meaning signifying to persons dealing in the articles described that when branded with such words or letters the articles are of the manufacture of a particular person.

But where the plaintiffs used the letters C.A.P., standing for "cream acid phosphates," in connection with acid phosphates manufactured by them, and the defendants used the same letters, signifying "calcium acid phosphates," in connection with acid phosphates manufactured by them, and prominently stated thereon to be manufactured by them, and the evidence did not shew that there was on the part of the defendants any fraud, or any intention of appropriating any part of the plaintiffs' trade, or that any purchaser or person invited to purchase was deceived or misled, or that the letters had come to mean in the trade, acid phosphates of the plaintiffs' manufacture:—

Held, that the plaintiffs could not complain of the use of the letters by the defendants.

Reddaway v. Banham, [1896] A.C. 199, applied. *Provident Chemical Works v. Canada Chemical Manufacturing Co.*, 182.

“*Caledonia Water.*”]—See TRADE NAME.

TRADE NAME.

Infringement of—“*Caledonia Water.*,” “*Caledonia Mineral Water.*”]—The plaintiffs had been for many years the owners of certain springs and had procured a trade mark to be registered of the water therefrom under certain devices and the names “*Caledonia Water*” and “*Caledonia Mineral Water.*” This water, through the plaintiffs’ exertions and the expenditure of large sums of money, had become widely known, and was used medicinally and as a beverage. The name “*Caledonia*” was the name of the township in which the springs were situated, but this had been lost sight of in the name given to the plaintiffs’ place, “*Caledonia Springs.*” where they had erected a hotel around which a village of that name had sprung up, and a railway station of the same name had been placed. The defendants purchased a lot about a quarter of a mile from the plaintiffs’ place, where they sank an artesian well from which they procured a water which they sold under the name of “*Caledonia Water*” and “*Water from the New Springs at Caledonia.*” imitating the shape and make of the plain-

tiffs’ goods, the object admittedly being to sell their water in the market established by the plaintiffs:—

Held, that the defendants’ acts were calculated to mislead, and did mislead, purchasers, and an injunction was granted restraining the defendants from selling the water under the names adopted by them. *Grand Hotel Company of Caledonia Springs, Limited v. Wilson*, 322.

TRESPASS.

Assault — Conviction for — Criminal Code, secs. 783, sub-sec. (c), sec. 786 — Civil Action — Right to Maintain.]—A defendant charged with having committed an assault with intent to do bodily harm, on being asked by the justice whether he would be tried before him summarily, or by a jury, elected to be so tried by him, and pleaded guilty to the charge. This was objected to by the prosecutor, when the justice stated that he would first ascertain the extent of the assault. After hearing the evidence, he adjudicated upon the case, and drew up a conviction imposing on the defendant a fine, and the costs, which the defendant paid:—

Held, that the justice in making the conviction was acting under the special statutory authority for the trial of indictable offences conferred by sec. 783, sub-sec. (c) and sec. 786, under which a defendant is not relieved from further civil proceedings; and that the defen-

dant was liable to a civil action for the assault. *Clarke v. Rutherford*, 206.

TRIAL.

Jury—Verdict—Weight of Evidence—Railways—Fire.—

In an action against a railway company to recover damages because of fire caused by sparks from an engine, two witnesses called on behalf of the plaintiff, men without much practical experience, testified that, in their opinion, the engine in question was defective constructively in a certain particular, while eleven witnesses called by the defendants, all men of practical experience, testified that the engine was constructed in accordance with the best prevailing practice. The jury found for the plaintiff:—

Held, that in a case of this kind, depending upon the weight to be given to scientific and expert testimony and not upon questions of credibility and demeanour, such a verdict could not stand, and it was set aside and the action dismissed.

Judgment of Falconbridge, J., reversed, ARMOUR, C.J.O., dissenting. *Jackson v. Grand Trunk R.W. Co.*, 689.

TRUSTEE.

Lien—Abortive Sale—Foreclosure—Purchase by Trustee—Report on Sale—Certificate in Lieu of—Order—Terms.—The defendant having been declared a trustee, with a lien for ad-

vances, and the greater portion of the trust estate having been offered for sale, to satisfy the amount found due him, under the direction of the Court, and the sale having proved abortive:—

Held, that the defendant's position as a trustee debarred him from the ordinary remedy of foreclosure to which a mortgagee is entitled after an abortive sale. But, after a sale by auction has been tried in vain, the trustee is at liberty to make proposals on his own behalf, and the Court may, in its discretion, accept him as a purchaser of the estate.

Tenant v. Trenchard (1869), L.R. 4 Ch. 537, 546, 38 L.J. Ch. 661, followed.

Held, also, that it was not necessary to wait for the report on sale, but the motion might be based upon a certificate of the Master shewing that the sale had proved abortive, no ground for impeaching the sale proceedings being suggested.

Held, also, that the property offered for sale not being the whole of the trust estate, it would not, upon the evidence, be just to compel the defendant to accept it in satisfaction of his entire claim.

The defendant offering to submit to terms, an order was made providing that he should be allowed to purchase at the amount of his claim less \$250, in the event of \$17,500 not being realized by a sale by tender or private contract. *Hutton v. Justin*, 713.

Liability of—"Honestly and Reasonably."—See WILL, 3.

WAY.

Non-repair — Opening in Street—Accident to Foot-passenger—Liability of Municipal Corporation—Nonfeasance—Limitation of Actions—Trap-door—Want of Guard—Master and Servant.—Two servants of one of the defendants were engaged in their master's business in unloading and storing a cask of beer in the cellar of his house by means of opening a trap-door in the sidewalk in front of his house. This was at night, and the trap-door being left open, and no light or guard being provided, the plaintiff fell into the opening and was injured:—

Held, that this negligence of the servants was attributable to the master, who was liable for the injury.

No act of negligence was proved against the other defendants, the village corporation, nor was there evidence upon which notice to the corporation might be attributed; the construction of an opening in the sidewalk is authorized by the Municipal Act, sec. 639, and no fault was alleged in its construction or maintenance; the corporation had no knowledge of the opening being left after dark without protection, and it was not shewn that they had means of guarding against it:—

Semble, that, under these circumstances, the corporation was not liable.

Homewood v. City of Hamilton (1901), 1 O.L.R. 266, considered.

But, supposing the corporation liable, it could only be for nonfeasance, and not for misfeasance, and the action failed because not brought within the proper time. *Minns v. Village of Omemeé*, 579.

WILL.

1. *Construction—Tenant for Life—Carrying on Business—Profits.*—A testator devised and bequeathed all his property real and personal to his wife "to be used and enjoyed by her for and during the term of her natural life and widowhood, and after her decease or marrying again" to named members of his family. At the time of his death he was carried on business as a brickmaker upon premises leased by him, he having the right to take clay. The widow, with the assent and co-operation of members of the family, carried on the business and developed it, using the plant and renewing it when necessary, and when the lease fell in some years after the testator's death, she took a new lease of the same and other premises, and at her death the business had increased very much in value:—

Held, by the majority of the Court, that the personal estate should have been converted into money and not used in specie by the widow, but that having been so used the increased value of the business enured to the

benefit of the remainderman and did not form part of the widow's estate.

Judgment of a Divisional Court, 32 O.R. 36, affirmed. *Wakefield v. Wakefield*, 33

2. *Construction—Devise—“Shelley's Case”—Defeasible Fee—Executory Devise Over.*—A testator, dying in 1833, devised land “to his son Alexander for life, and after his death to his heir-at-law should have any (*sic*); if not, to his brother John”:—

Held, that the gift to Alexander gave, by the operation of the rule in Shelley's case, a fee simple or tail to him. “Heir” is *nomen collectivum* and carries the fee. But the last clause of the devise imported a defeasible estate in Alexander, and, as he left no “lawful heir” or “heir-at-law,” his fee tail or simple was defeated by the executory devise in fee simple in favour of John. *Grant v. Squire*, 131.

3. *Construction—Alternative Disposition—Death of Testator and Wife “at the Same Time”—Executors—Technical Breaches of Trust—Limitation of Actions—“Honestly and Reasonably.”*—The testator bequeathed to his wife all his estate and appointed her his executrix. His will then proceeded: “In case both my wife and myself should by accident or otherwise be deprived of life at the same time, I request the following disposition to be made of my property” disposing of his estate and appointing executors. The will made no

provision for any other event. The testator and his wife shortly after the will was made went to Europe, and both of them died there, the wife on the 11th December, 1888, and the testator on the 27th of the same month:—

Held, that the testator and his wife were not deprived of life at the same time, the deaths not being the result of a common accident or other catastrophe, but due to ordinary disease; and, as the actual event was not provided for, there was an intestacy.

There is nothing irrational or absurd in the provision that the alternative dispositions of the will should take effect only in the event of the testator and his wife being deprived of life at the same time, even if the words “at the same time” be read as meaning, without any interval of time elapsing between the death of one and that of the other.

Held, also, that, although the appointment of executors to carry out the alternative provisions of the will never took effect, the persons named as executors, having obtained probate, became trustees for the persons entitled upon an intestacy; payments made by them to those who would have been beneficially entitled if the alternative provisions had taken effect were breaches of trust; but the statute of limitations was a bar to a recovery in respect of any of those breaches which occurred more than six years before the action was brought: R.S.O. 1897 ch. 129, sec. 32.

Held, moreover, that the executors were entitled, under 62 Vict., 2nd sess., ch. 15 (O.), to be relieved from personal liability for all breaches of trust committed by them, they having acted honestly and reasonably, in view of the facts that the construction of the will was doubtful, that the trial Judge took the same view of its effect as they did, and that for eleven years everybody interested in the estate acquiesced in that view. *Henning v. Maclean*, 169.

4. *Construction—Devise—Estate in Fee*—“*Leaving no Children*” *Divesting — Executory Devise over — Contrary Intention — Vendor and Purchaser—Doubtful Title—Specific Performance.*]

—A testator by his will gave his widow a life estate in land, and then devised it to his son Philip and his lawful heirs and assigns, and then, after devising certain other property to another son, he continued: “I also, give, devise, and direct, should any of my sons *die leaving no children*, the property bequeathed to said son shall be equally divided between all my children, sons and daughters and grand-daughters aforesaid, share and share alike.

. . . Should any of my children be disposed to sell any part or the whole of the property bequeathed to them, I desire and direct that they give the preference or refusal to one of the family . . .”

The testator died in 1878, leaving him surviving his widow, who died in 1898, three sons,

Philip being one, and four daughters. At the time of the testator's death Philip was married and had two children. In 1891 the widow and Philip made a conveyance of the land devised to him, under which the plaintiff claimed. At the time of this action Philip and his children were still living:—

Held, that the estate in fee in Philip was subject to being divested by his dying, “leaving no children,” which might still happen, and in which event the executory devise over would take effect.

The fourth rule laid down in *Edwards v. Edwards* (1852), 15 Beav. 357, is overruled by *O'Mahoney v. Burdett* (1874), L.R. 7 H.L. 378, and the rule now is, that when there is a gift over in the event of death without issue, that direction must mean death without issue at any time, unless a contrary intention appears in the will, and that the introduction of a previous life estate does not alter that principle of construction.

Olivant v. Wright (1875), 1 Ch. D. 346, followed.

Held, also, that the provision in the will as to any of the children of the testator being “disposed to sell” did not shew a “contrary intention.” *Held*, also, that a “contrary intention” was not indicated by a devise in the same will to another son subject to the same limitation and conditions, but subject also to the payment of legacies of \$2,000 at the expiration of two years from the testator's death—which

appeared to be inconsistent with anything short of an absolute estate in fee.

Cowan v. Allen (1896), 26 S.C.R. 292, followed.

Held, therefore, that the plaintiff's title was not one that could be forced upon an unwilling purchaser, and a decree for specific performance should be refused. *Vanluven v. Allison*, 198.

5. *Gifts to Issue*—*Gift to Class*—*Executors*—*Purchase by Executor*—*R.S.O. 1897 ch. 128, sec. 36.*—*R.S.O. 1897 ch. 128, sec. 36*, as to gifts to issue, who leave issue on testator's death not lapsing, applies only to cases of strict lapse and not to the case of gifts to a class, such as a residuary bequest "equally among my children share and share alike."

A testator died possessed of shares in a company. Afterwards, upon fresh allotments of stock being made, his executrix took up the additional shares, paying the premium out of her own money as to some of the shares and selling her right to others:—

Held, that she was not entitled as against the estate to such new shares, but only to a lien thereon for the amount advanced by her to take them up. *In re Sinclair, Clark v. Sinclair*, 349.

6. *Construction*—*Estate Tail*—*Estate for Life*—*R.S.O. 1897, ch. 128, sec. 30*—*Mistake of Title*—*Improvements*—*R.S.O. 1897, ch. 119, sec. 30.*—A will made in 1877 by a testator who died

in 1882, contained the following provision: "To my son, Moses, I give and bequeath fifty acres during his lifetime and then to go to his children, if he has any, but should he have no issue then to be equally divided among all my grandsons." Moses married after his father's death, and left children him surviving at the time of his own death:—

Held, that Moses took an estate for life with a remainder in fee to the children and not an estate tail.

Held, also, that a person who had purchased the land in question under the *bona fide* but mistaken belief that Moses took an estate tail was entitled to a lien for lasting improvements, the statute being held to apply to a mistake of title depending upon a question of law.

The point for determination in such a case is whether the person claiming for the improvements made them under the *bona fide* belief that the land was his own.

Judgment of Meredith, J., affirmed. *Chandler v. Gibson*, 442.

7. *Devise for Life and that of Wife, or Survivor*—*Special Occupant*—*Partial Intestacy.*—A testator by his will devised lands to his son for his life, and in the event of his marriage, for the life of his wife or the survivor, and at his or their death, to his children, if any; but if he should die without issue, then over. The son married twice, having children by

his first wife, but none by his second, who survived him :—

Held, that the widow was not entitled to a life estate by implication, and there being no special limitation to the heirs of the son, they could not take as special occupants during her life, and consequently the lands for the residue of her life went to the son's executors and were assets in their hands. *Wilson v. Butler*, 576.

8. *Construction—Devise—Charge of Debts and Legacies—Bequest of Rents—Estate in Land—Rule in Shelley's Case—Bequest of Proceeds of Sale—Principal and Interest—Administration Expenses—Apportionment.*]—A testator devised land to his son, and in his will directed the son to pay debts and legacies :—

Held, that the effect of this was to charge the payment of both debts and legacies upon the land devised.

Robson v. Jardine (1875), 22 Gr. 420, followed.

McMillan v. McMillan (1874), 21 Gr. 594, distinguished.

The testator by his will gave a house and lot to his daughter, but by a codicil purported to revoke the gift, and directed as follows :—"I will that the said house and lot be held by my daughter . . . who shall receive all rents and benefits therefrom during her natural life, and at her decease that all rents shall be invested for the benefit of her heirs on their coming of age " :—

Held, that by the rule in Shelley's case the daughter took an estate in fee simple in the lands.

VanGrutten v. Foxwell, [1897] A.C. 658, and *Verulam v. Bathurst* (1843), 13 Sim. 374, followed

With reference to another parcel of land the codicil directed that all rents derived from it were to be divided between the testator's wife and daughter equally, and that on the death of a life-tenant the property should be sold and one-half the proceeds given to his wife or her heirs, and the other half invested, the principal for the benefit of the heirs of his daughter, and interest to go to his daughter during her life :—

Held, that as to one-half of this land also, the daughter took an estate in fee simple.

The testator did not provide for the payment of administration expenses, though he directed that his debts and funeral expenses should be paid by his son :—

Held, that the estate as a whole should defray the expenses of administration, and if there was a different disposition of the real and personal parts, there should be a ratable apportionment according to the respective values of the real and personal estate. *Re Thomas*, 660.

9. *Separate Gifts to Parent and Child—Defective Title—Lien for Improvements and*

Purchase Moneys—Occupation Rent.—A testator, by will made before the 1st January, 1874, devised his farm "To J. H. for the term of his natural life; after his death to his children in equal shares; should he die without a child living at the time of his death then to G. for his life and after his death to his children in equal shares; if G. should die without a child living at his death then," etc., etc. :—

Held, that there were two gifts, one to J. H. for life, and the other to his children in equal shares, which carried the remainder in fee to the child or children subject to be divested if he died without a child living at his death.

Under the circumstances of this case where the defendants had taken possession under an agreement to purchase in fee, with covenants for good title free from incumbrances, from the plaintiff, who claimed through J. H. under the above devise, the defendants were declared to have a lien on the land for lasting improvements made and purchase moneys paid after being charged with a fair occupation rent. *Young v. Denike*, 723.

Annuity—Charge on Lands—Arrears. See LIMITATION OF ACTIONS, 1.

Bequest by Husband of Wife's Property—Election. See EXECUTORS AND ADMINISTRATORS, 1

Direction to Set Aside Certain Sum for Widow—Productive and Non-Productive Assets—Rights of Life-Tenant.—See EXECUTORS AND ADMINISTRATORS, 4.

WINDING-UP.

Application for Order—Discretion of Court.—See COMPANY, 5.

Position of Liquidator—Impeaching Consideration for Notes—Bank Account.—See BANKS AND BANKING.

Service of Petition—Time.—See PRACTICE, 4.

WORDS.

"*Blackmailing.*"—See DEFACTION, 1.

"*Heir-at-law.*"—See WILL, 2.

"*Occupation or Exposure.*"—See INSURANCE, 1.

"*Voluntary Exposure to Unnecessary Danger.*"—See INSURANCE, 1.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See MASTER AND SERVANT, 2.

UNDUE INFLUENCE.

Parent and Child—Principal and Agent.—See GIFT.

